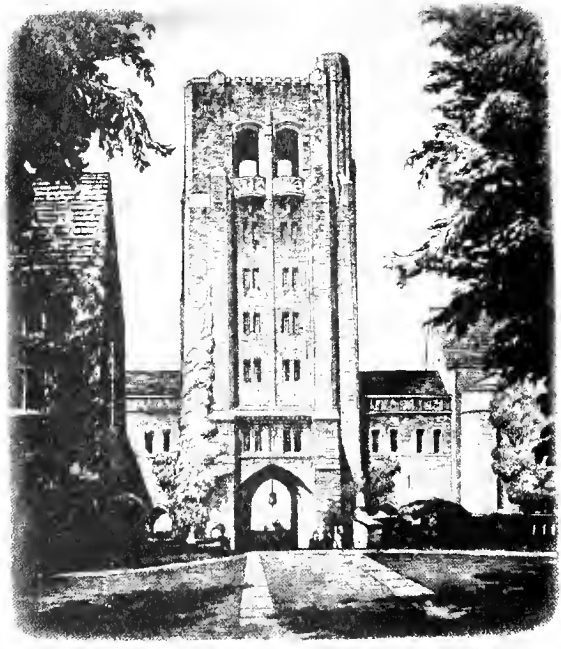

PRINCIPLES

OF THE

FEDERAL LAW

As Presented in Decisions

OF THE

SUPREME COURT

Citing Something Over 3,500 Cases

2 Dallas—241 U. S.

(Congressional Legislation to February 1, 1917)

By

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WASHINGTON, D. C.

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PREFACE.

Owing largely to greater breadth in past periods than at present, of right of resort to the Appellate Jurisdiction of the Supreme Court of the United States, a very considerable proportion of the reported decisions of that Court deal exclusively with other than Federal law; certain cases deal only with Federal law of mere local concern and interest, (as, local law of a Territory); others, with Federal law such by mere Federal adoption (as, general Admiralty and Maritime law); others, with such Federal law as might perfectly well, in character, be law of any country; while still other cases are, for one or for another reason, of no (or of no general) present interest. Cases within these various classes being set apart, there remain between three and four thousand cases, (or one-third of the whole matter), presenting and embodying (with the text of the Constitution, and the Congressional texts, with which such cases deal), what may be called the Federal Law Proper, or, (as in our Title), Principles of the Federal Law. It is the Federal law proper, as thus defined, that is the field of study of the present treatise.

The field may be otherwise described as the broad field of Federal Question, (in the conventional sense of that expression), less such portions thereof as are now denied right of resort from a Circuit Court of Appeals to the Supreme Court: such portions being typically represented by other than Constitutional questions, in general Bankruptcy, Admiralty, Patent, Revenue, Commerce, and Criminal, law.

In so far as the field (as thus above defined) of the treatise is capable of broader, or of narrower, definition, the aim has been to adopt a broader, rather than a narrower, view.

Matter not strictly within, but closely underlying, or otherwise closely interwoven with, the field as above defined, has been included as far as seemed necessary for clearness or for practical convenience: as in the case of

law of Judgment and Decree, in its relation to Faith and Credit.

From a practical point of view, the field dealt with may be defined as that portion of the Federal law—apart from particulars of Bankruptcy law—with which (and with which alone) lawyers in general practice are commonly concerned.

The field in question embraces both Federal Organic (or Constitutional) law and other Federal law; and comprises law of Judicial Procedure as well as Substantive law.

Conciseness—notwithstanding the breadth and importance of the field in question—is made practicable: first, by broad, progressive conversion, through the period of the decisions in question, of gravely disputed contention into elementary proposition; second, by facilitation of generalization and classification through treatment of the field by itself, and as a whole.

The body of Judicial decision in question, although slowly and gradually accumulated, particular by particular, over a long period, has, nevertheless, developed, from the beginning, with continuity of conception, and symmetrically, and constitutes a homogeneous whole, each part of which (speaking broadly) bears upon, and is capable of affording light upon, every other part, even as among fields in many respects widely remote from each other.

Washington, D. C.,
February 1, 1917.

CITATIONS.

Citations of both the Lawyers' Co-operative series and the Supreme Court Reporter series are, with the exception mentioned below, taken, by courtesy of the Lawyers' Co-operative Publishing Company, from that Company's Supreme Court Digest, the Supplement thereto, and the Tables of Cases of Volumes 57-60 of the Lawyers' Edition—the order of citation, in those publications, as between the two series above referred to, being followed, for harmony.

Citations of cases in Volumes 33 and 34 of the Supreme Court Reporter, (covering 226 U. S. to 234 U. S., inclusive), are, by courtesy of the West Publishing Company, taken from the consolidated Tables of Cases of the Volumes above referred to of the Supreme Court Reporter.

As to form of citations of the Lawyers' Edition, and of the Supreme Court Reporter, see Uses of Terms, below.

As to differences in case-titles, as among the three series, see Table of Cases, ad init.

TABLE OF CASES.[1]

The running case-titles of the official edition,[2] (the form commonly used in citation, in that series), are employed in general, in the Table of Cases below. Materially different case-title forms, of either of the three series cited in our text proper, can, in general, be readily traced by the following indications:

For official titles, (as, Attorney-General, Collector, Board), see under the State, municipality, or the like, in question. So, of the personal name of an official, (e. g., Meyer, Auditor of the State of Oklahoma v. Wells, under Oklahoma).

For State, Commonwealth, People, see under the local name of the State. So of City, County, School District, and the like.

For Ex parte, In re, Matter of, and the like, see under the name of the party.

For Ex rel. cases, see, first, under the name of the beneficial, secondarily, under that of the formal, party.

For corporate names in Wallace, see first under the generic corporate designation, (e. g., Providence Tool Co. v. Norris, 2 Wall. 45, under Tool Co.); so of Bank, Railroad, Railway, Bridge Co. etc. For cases in other volumes, see first under the full corporate name.

For names of persons or corporations beginning with initials (as, I. M. Darnell & Son Co.), or with a full Christian name, (as, John Woods & Sons) see first under the surname. Otherwise of names of vessels.

In certain instances, an intermediate word of a corporate name is to be resorted to, (e. g., Pennsylvania Lumbermen's Ins. Co. under Lumbermen's; New York, Lake Erie & Western R. R. under Erie).

The word "national" (bank) is omitted, when not an initial word. So of "State".

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[1] As to citation, in the text, of the Lawyers' Edition and the Supreme Court Reporter, see p. lxxiv.

[2] "Official": as to early volumes, official only by Federal recognition.

"Railroad" and "Railway", when not, respectively, the sole, or the initial, word of a corporate name used, (i. e., when abbreviated to R. R. or Ry.), are both treated as "Railroad". Thus, Chicago, B. & Q. Ry. v. Babcock precedes Chicago, B. & Q. R. R. v. Chicago.

Occasional cases known to a particular reader only under a title used exclusively in the Lawyers' Edition or in the Supreme Court Reporter, and not readily discoverable in the Table of Cases below, can, of course, be easily traced by familiar means available for that purpose.

In a considerable number of instances, even within the field covered by the indications above, cross-references have been inserted.

Numerals in general refer to sections. Occasional numerals, in parentheses, following a section-number, refer to sub-numbering within the section.

TABLE OF CASES.

The numbers refer to sections; the figures in ( ) refer to a paragraph in the section which they follow.

A.

B.

Brewster—Burton.

Corbus—Curran.

D.

F.

G.

Harden—Henderson.

J.

L.

M.

O.

Oakley—Oswald.

Otis—Pearson.

P.

Peck—Pinel.

Q.

R.

Robb—St. Clair.

S.

Stockard—Taylor.

T.

W.

USES OF TERMS, AND THE LIKE.

United States proper: the Federal realm exclusive of Foreign possessions.

Federal area: area (intra-State or extra-State) of exclusive Federal Sovereignty, as, a Territory; an Indian Reservation (intra-State or extra-State); the District of Columbia, or a State-ceded intra-State Military Post.

State area proper: the area of a State, exclusive of Federal area within the State.

Federal State: a politically-organized portion of Federal area, whether self-governing or not: (as, a self-governing Territory, or the (not self-governing) District of Columbia).

Area (as employed principally in Book III): designating indifferently, a State of the Union or a Federal State.

Political Society: the United States; a State of the Union; a Federal State; a Foreign Nation, or a quasi-independent Foreign Dependency (as, Canada).

Quasi-Sovereign: employed in respect of a self-governing (and, occasionally, with qualification, of a non-self-governing) Federal State.

Officiel: employed occasionally (for lack of a convenient English term) to designate the body, or a particular body, of officials (Federal or State) as a class or group.

Suprastate (commerce): commerce conducted (and as conducted) partly, but not wholly, within the area proper of a single State: including inter-State ("interstate") commerce (strictly so designable); State-Foreign commerce, and commerce between area proper of a State and a Federal area; but exclusive of Indian commerce as such.

Intercommerce; Intertransit; Interferriage and the like: employed, for brevity, for, or in respect of, suprastate commerce or features or aspects thereof.

The forms inter-State; intra-State; extra-State, etc., (as against interstate, intrastate, etc.): used, in certain connections for emphasis of the principal component word; in other connections because of absence, as yet, of familiar

use, to such intent, of the consolidated form. Thus: inter-State compact; intra-State Federal Sovereignty; indirect extra-State power (of a State).

Organic law (Federal or State): law of supra-Legislative stability.

Non-Exclusive (Federal Original Common Law and Equity Jurisdiction): see § 718, par. 5.

Legislative; Legislation: used, in certain connections, (with explanation by the context), in a broad sense, of all action of law-making operation: as, for example, at one extreme, establishment or Amendment of a State Constitution; and, at the other extreme, a municipal ordinance or by-law.

Law of Nations: we employ this term, rather than the expression International Law, partly because of employment of the former term by the Constitution; but, independently of that consideration, for the reason that the latter term suggests, and is, in general, used in respect of, relations between mutually independent nations; while we have occasion to consider the field in question almost exclusively (see, particularly, §§ 140-142; §§ 143-149; Book III, generally; § 551; §§ 644-650; §§ 651, 652), in respect of its Federal (adoptive) Domestic operation as among the different component political societies (see above) of the Federal political system.

Initial capitals: a slight degree of exceptional use of initial capitals is made, for emphasis of distinction between technical and non-technical; special and general; or abstract and concrete, sense. Thus, Jurisdiction (in general); jurisdiction (of a particular cause).

L; S. In citations of cases, L designates the Lawyers' Co-operative series; S the Supreme Court Reporter series. Thus: Abbott v. Tacoma Bank, 175 U. S. 409; S 20: 153; L 44: 217 is to be read, as to the latter part: 20 Sup. Ct. Rep. 153; 44 L. Ed. 217.

As to derivation of such citations, see immediately after the Preface.

As to different forms of case-titles, see Table of Cases, ad init.

GENERAL DIVISION OF THE SUBJECT MATTER

FIRST DIVISION

SUBSTANTIVE LAW: - - BOOKS I—VI

SECOND DIVISION

LAW OF JUDICIAL PROCEDURE: BOOKS VII – X

TABLE OF CONTENTS.

FIRST DIVISION.

BOOK I.

Figures in ( ) refer to sections.

BOOK II.

[1]The relative order of Parts, of Book II, is fixed: partly by reason of the convenience, in general, of disposal first of relatively short matters; but chiefly for convenience of definition and delimitation, in advance,—by, and to the extent of, Parts I and II, respectively,—of the fields or field of the succeeding Parts or Part, and for avoidance, thereby of constant (expansive or limitative) repetition, for exactness, in the two later Parts, respectively.

BOOK III.

BOOK IV.

CERTAIN PRINCIPLES OF GENERAL (AND, PRIMARILY, OF PUBLIC), CHARACTER (301-424).

BOOK V.

SECOND DIVISION.

BOOK VII.

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[1] In respect of Due Process of Law in Legislative Procedure, see §§ 328-338; § 425; §§ 437-443.
In respect of Due Process of Law in Executive Procedure, see § 425, §§ 437-443.

BOOK VIII.

BOOK IX.

[1] “Non-Exclusive”: (“Concurrent”).

BOOK X.

FIRST DIVISION

SUBSTANTIVE LAW

BOOK I.

ORIGINS, AND PRE-CONSTITUTION STAGES.—GENERAL VIEW OF THE CONSTITUTION, ORIGINALLY, AND AS NOW AMENDED.

PART I.—THE PERIOD PRIOR TO THE TAKING EFFECT OF THE CONSTITUTION.—SURVIVALS UNDER THE CONSTITUTION.

PART II.—GENERAL VIEW OF THE CONSTITUTION, ORIGINALLY, AND AS NOW AMENDED.

PART I.

THE PERIOD PRIOR TO THE TAKING EFFECT OF THE CONSTITUTION.—SURVIVALS UNDER THE CONSTITUTION.

CHAPTER I.

Prior to the First Continental Congress.

§ 1. Early American Federations.

The conception and the fact of inter-Colony Federation had, in 1774, long been familiar, as also the conception and the fact of Written Federal constitutions.[1]

§ 2. The Pan-Colony Convention of 1754—Franklin's Plan.

In 1754, a pan-Colony Convention agreed to a plan of pan-Colony Federation,—in which were embodied, and anticipated, important features of the Constitution of the United States.[2]

§ 3. Committees of Safety.

By the late summer of 1774, there had arisen in each of twelve of the Colonies, a vast network of town, county, and district "Committees,"[3] of one or another designation.[4]

They represented primarily, and in avowed aim, mere Resistance to acts—asserted to be unlawful—of the British Crown; they were, however, conditionally, and potentially, of Revolutionary character. These Committees constituted, in a particular Colony, a rudely-organized hierarchy, rising from town (or district) to county; and from county to Colony, culminating in a central Colony body,

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[1]1638—9: Federal union of the settlements or quasi-Colonies of Windsor, Hartford, and Wethersfield, in Connecticut, with Written constitution (the "Fundamental Orders of Connecticut"); see Appendix.

1643: Federation of Massachusetts Bay, Plymouth, Connecticut, and New Haven, as "the United Colonies of New England", with a Written constitution entitled "Articles of Confederation", etc.; see Appendix. This instrument contained a number of fundamental features which were adopted in the Articles of Confederation of 1781, and were thence carried over into the Constitution of the United States. See Comparative Table, Appendix.

[2]Appendix: Franklin's Plan of Union of 1754; Comparative Table, Appendix.

[3]The "district" committees represented so-termed "military districts", arbitrarily established, as occasion seemed to arise.

[4]Committees "of Safety", "of Inspection", etc.

which was, in certain Colonies, the Colony Legislature, or the lower branch thereof, acting, to this intent, as a mere Committee of Safety.

§ 4. Executive Aspect.

One of the chief functions—perhaps we should say the prime theoretical and actual function—of the local Committees, was that of Executive of the central Colony bodies. With these local Committees at their service, the central Colony bodies were thoroughly and effectually officered for Executive operation. In most of the Colonies, therefore, there was in existence, and in full operation, a complete and effective, although rude, de facto organization, rising, as a hierarchy, from town (or district) to Colony.[5]

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[5]As far as the present writer is informed, there has been no full and detailed treatment of the subject of Revolutionary Committees, as a whole. The Journals of the Congress, passim, display, as of the period September 1774-1776, circa, the widespread and effective character of the system. Records of some of the de facto bodies of higher and of lower grade, are accessible. County and town histories deal with the matter in some detail.

Books and monographs cited below, give, however, collectively, a clear view of the matter.

For reference to these authorities, the author is indebted to Dr. J. Franklin Jameson, Director of the Department of Historical Research in the Carnegie Institution of Washington.

Bates, Rhode Island and the Formation of the Union. (Columbia Univ. Studies, Vol. X, 163, et seq.).

Collins, Committees of Correspondence of the American Revolution. (Am. Hist. Ass., 1901, Vol. I, 245).

Connor, Cornelius Hartwell: an Essay in North Carolina History. (With many references to original sources). Raleigh, 1909.

Cushing, Transition from Provincial to Commonwealth Government in Massachusetts. (Columbia Univ. Studies, Vol. VII, 1896).

Flick, Loyalism in New York. (Columbia Univ. Studies, Vol. XIV, No. I; Chap. IV: "County Inquisitorial Organizations").

Gilbert, Connecticut Loyalists. (Am. Hist. Review, Vol. IV, p. 273).

Hunt, The Provincial Committees of Safety of the American Revolution.

Jameson, Essays in the Constitutional History of the United States.

Lincoln, The Revolutionary Movement in Pennsylvania.

Sikes, The Transition of North Carolina from Colony to Commonwealth (Johns Hopkins Univ. Studies, Series 16, 1898).

Silver, Provisional Government of Maryland, 1774-1777. (Johns Hopkins Univ. Studies, Series 13, No. 10).

§ 5. Need of Pan-Colony Organization.

Such intra-Colony system, however, was deemed not sufficient for connected and sustained Resistance; but aid from one Colony to another, and joint action between or among Colonies, was deemed imperative; and a culmination of the system was deemed necessary, in a pan-Colony hierarchy, with a pan-Colony Committee of Safety (of one or another designation) as its head, with the several Colony, county, town, and district Committees, of whatever designation, as its Executive arm.

§ 6. Initial Action.

In the course of 1774, and prior to September of that year, delegates from twelve of the Colonies were chosen to constitute, collectively, such a pan-Colony Committee: the mode of choice of delegates varying widely, as among the Colonies, from a Colony-wide and somewhat formal mode, to the extreme of local limitation in action, and of informality.[6]

Small, Beginnings of American Nationality. (Johns Hopkins Univ. Studies, Series 8).

Sparks, Life of Gouverneur Morris, Vol. I, pp. 30 et seq.

Thompson, Anti-Loyalist Legislation During the American Revolution. (Illinois Law Review, Vol. 3, pp. 80, 147).

Tyler, The Party of the Loyalists in the American Revolution. (Am. Hist. Review, Vol. I, p. 24).

Van Tyne, The Loyalists in the American Revolution. Macmillan, 1902 (with many references to original sources).

Whitaker, Provincial Council and Committees of Safety in North Carolina. (No. Car. Hist. Soc. 1908).

Thomas Vernon's Diary. (R. I. Hist'l Tracts, No. 13).

[6]See Appendix. No delegates were chosen in Georgia.

CHAPTER II.

The First Continental Congress.

§ 7. Assembling:—The Term "Congress."

The delegates assembled at Philadelphia, September 5, 1774, and sat for about six weeks. The body adopted no title for itself; and it was only at a later period that the term "Continental Congress" became the general designation for it.

The term "Congress" had, in 1774, nothing of the specific meaning that we now attach to it. In the language of the Law of Nations, it was frequently applied to formal assemblages of diplomatic representatives. It did not suggest continuity or permanency of political office, or, indeed, the idea of political office at all. It was not, in 1774, in use as a formal designation of any de jure governmental body in England or in North America. It had, very lately, been locally adopted as a designation of certain of the Colony Committees of Safety (as, in the case of the "Provincial Congress" of Massachusetts). It was an apt designation for an off-hand assemblage, hastily formed to meet a sudden emergency; acting under no settled Organic law; and of mere de facto authority.

§ 8. Instructions to Delegates.

The instructions to the delegates varied, in some degree, as among the Colonies.[1]

§ 9. Action of the Congress:—(a) Generally.

The "Congress" adopted (with immediate, and ultimately continued general approval and support), a Bill of Rights,[2] embracing, although in a provisional attitude, propositions which, in unbroken continuity of development, and of ultimate establishment as law, finally became the fundamental principles of the American dual Sovereignty. The instrument was thereby, in certain of its fea-

[1]Appendix.

[2]Appendix. (Characterized, Dec. 5, 1774, as a "Bill of Rights" by the de facto "Provincial Congress" of Massachusetts).

tures, and in one of its aspects, inchoate Organic law (and an Organic text) of the Sovereign political society which was soon (July 4, 1776) to come into existence as the United States of America.

The "Congress" further, among other acts, agreed upon, and promulgated Non-Intercourse Resolutions,[3] and an "Association," so-designated,[4] of provisional Revolutionary character.

§ 10. Directions for Enforcement.

The Congress—assuming to itself power so to act—ordered direct enforcement of the "Association" upon persons and things,—not merely by and through the central Colony Committees (of different forms and of different designations) but also—independently of the central Committees—by the County, town, or district, Committees.

§ 11. Enforcement.

During the period from the dissolution, in October 1774, of the first Congress, to the assembling, May 10, 1775, of its successor—not to speak here of later periods—the Resolutions and directions above considered, were given, in the twelve Colonies in question, vigorous enforcement in accordance with the directions which the "Congress" had assumed power to give. The enforcement was carried out, in part, by or through, the central Colony Committees, of one or of another designation, but, in large measure, by independent action of the County, town, or district Committees —Committees of the latter class thus acting directly under the authority of, and as an Executive arm of, the late Congress in its aspect of a pan-Colony Committee of Safety.

In and by such actual enforcement, of higher or of lower plane, there was initiated a Federal Executive Branch, as, also (in a looser and ruder sense) a Federal Judicial Branch; inasmuch as questions of fact had necessarily to be passed upon by the Committees,—thus initiating the ultimate (and present) Federal doctrine,[5] of Federal law as Law of the Land (operative directly upon persons and things) in Colony (ultimately State) area.

The "Congress", in dissolving itself, advised the meeting of a successor to itself.

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[3]Appendix. [4]Appendix. [5]§§ 89-92.

CHAPTER III.

FROM THE ASSEMBLING OF THE SECOND CONTINENTAL CONGRESS (MAY 10, 1775), TO THE TAKING EFFECT (MARCH 4, 1789) OF THE CONSTITUTION OF THE UNITED STATES.

§ 12. From the Assembling of the Congress to the Declaration of Independence.

May 10, 1775, a second pan-Colony Committee or "Congress"—the second "Continental Congress"—assembled, all the Colonies, being in some sense, represented.[1]

This body—during the period now immediately in question, of its existence—went far beyond its predecessor, in the creation of (as yet provisional or inchoate) Federal law. It assumed, and exercised, power of fixing boundary-lines as between Indian Tribes and Colonies.[2]

It initiated, (for Colony area) and acted upon, the present Federal doctrine[3] of Vassal Sovereignty and Paramount Sovereignty as between such Tribes severally and the Colonies (ultimately States) in their Federated unity: with the corollary of Treaty status between such Tribes, severally, and the Colonies in such Federated capacity.

It assumed power of pledging the credit of the Colonies collectively.[4]

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[1]Delegates from Georgia appeared shortly after the assembling of the Congress.

[2]As to such boundary-lines as matter of Federal law, see §§ 346-354.

[3]§§28-38.

[4]The most conspicuous form was that of bills of credit. The form of bills of credit was:

> Continental Currency No. —. This bill entitles bearer to receive —— Spanish milled Dollars or the value thereof in gold or silver according to a resolution passed at Philadelphia, ——, 177—.

Another common form was that of engagements for salaries and pay of officers and soldiers; and for military constructions, such as roads, bridges, and fortifications.

The feature of Colony solidarity, in the indebtedness, appears by the action of the Congress, December 26, 1775, in respect of allotment by the Congress of the total indebtedness among the several Colonies, and as to pro rata liquidation by the Colonies (but only through the Federal government).

It continued the assumption, (made by the first Congress), of power of adding new members to the Federation.[5]

It assumed power to fix, for all purposes, the relative values of gold and silver coins of all origins and of all classes.

It assumed power of issue of irredeemable paper money; of making it a universal legal tender; and of fixing, from time to time, for all purposes, the value of such paper money, by a coin standard.

It assumed power to deal—from the standpoint of Foreign Commerce—with the question of Slavery.[6]

It assumed power, generally, over Foreign Commerce;[7] over Colony-Indian Commerce;[8] and over inter-Colony Commerce.

It assumed power to define Colony allegiance, and treason against a Colony.[9]

It assumed power to summon before it, and to punish, individuals viewed by it as guilty of Contempt of the Congress.[10]

It assumed and exercised a general War power, involving operations of all kinds, on sea and land, including seizure of places and chattels within the Colonies, for military necessities;[11] and the forcible disarming or summary ar-

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[5]January 24, 1776: invitation to the "inhabitants" of Canada to join the Federation.

[6]"Resolved, that no slaves be imported into any of the thirteen United Colonies": Apr. 4, 1776.

[7]Exportations to Quebec, Nova Scotia, St. John's, N. F., to Georgia, (except parish of St. John's) and to East and West of Florida, to cease; and no provisions or necessities to the British Fisheries on the American coast, until otherwise ordered. Dec. 29, 1775: three Colonies exempted from the operation of the Non-Importation Act, in respect of salt.

[8]January 27, 1776; regulation of trade with Indian Tribes; limitation to Federally licensed traders; prices fixed.

[9]June 24, 1776. [10]March 7, 8, 12, 1776.

[11]As, in the building of forts and posts, and in barricading the Hudson. The Congress authorized Washington to proceed to the length of destroying the town of Boston, if that should be found necessary, to dislodge the British troops. (Dec. 22, 1775).

rest and holding, with or without bail, of persons supposed to be disaffected.[12]

It enacted[13] the original of our present Articles of War,[14] and a like Code for the Navy.[15]

It originated our present system of Federal supervision over State militia.[16]

It originated what is now popularly called the "Regular" (then called the "Continental") Army; the Federal Navy; and the Marine Corps.

It assumed Judicial power and Jurisdiction[17] over controversies of Judicial character, between Colonies;[18] thereby initiating a Federal Judicial Jurisdiction which has continued without interruption to the present day.

It initiated the present Federal (Congressional and Judicial) Admiralty Prize Jurisdiction: by direct intervention in matters of capture on the high seas, whether by Continental, or by Colony, naval forces or privateers; by commissioning privateers, and by providing in respect of capture and of prize; by making rules even for Colony

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[12]Dec. 30, 1775. Order to General Schuyler to seize Tory arms and supplies, and to arrest the chiefs; Resolutions for seizing and detaining alleged Tory vessels on Chesapeake Bay, intending to evade Non-Exportation Act.

The Congress ordered and caused to be carried out, on a very considerable scale, the total disarmament of the Tories (March 14, 1776).

The Congress was constantly sending prisoners of its own (prisoners of War, or political suspects) to town committees, for parol-limits or for imprisonment.

Congress authorized seizure, trial and imprisonment, by Revolutionary Committees, of any and all grades, of persons suspected of adherence to the Crown.

The Philadelphia jail was adopted as a Federal prison, and prisoners were continually being held there by order of Congress.

[13]June 30, 1775; November 7, 1775.

[14]Thenceforth, with some Amendments, uninterruptedly in force to the present day. See McClaughry v. Deming, 186 U. S. 49, 55; S 22: 786; L 46:1049.

[15]November 28, 1775. [16]July 18, 1775.

[17]Exercise of Judicial powers by a body primarily Legislative was at the time familiar. See Maynard v. Hill, 125 U. S. 190, 204, et seq.; S 8:723; L 31:654.

[18]Appendix: Wyoming Controversy; New Hampshire Grants.

prizes;[19] and by its assertion of propriety of appeal to the Congress or to a Continental Prize Court from Colony Admiralty Courts.[20]

It initiated the institution of a Federal Census.[21]

It originated—by a process of progressive development from Congressional Committees—a number of the present Federal Executive Departments.[22]

§ 13. The Declaration of Independence.

At the moment of its promulgation, and for a long time thereafter, the Declaration of Independence was, of course, merely tentative,—having no recognition or operation except at home, and there representing mere de facto Federal Sovereignty. This de facto Sovereignty became a de jure Sovereignty retroactively (in the Federal view) as of the date of the promulgation of the Declaration of Independence;[23] and we may, therefore, for our purposes, speak of that instrument as having taken immediate de jure operation.

Certain aspects of the Declaration of Independence may be presented as follows:—

(1) In one of its aspects, the Declaration of Independence was a (Federal) Bill of Rights, in the strict sense; and, as such, is the legal (although not the verbal) original of a great part of the aggregate matter of the first ten Amendments;[24] as also, by parity of reasoning, of the Crim-

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[19]Nov. 24, 1775. [20]Nov. 24, 1775. [21]Feb. 17, 1776.

[22]A Board of War, so-called,—the original of our War Department, composed, at this time, of members of the Congress, but regarded as a separate Executive body, with its own Secretary (the original of our Secretary of War), and with offices, and a clerical force, of its own.

A Treasury Department (two joint "Treasurers of the United Colonies") and a Standing Committee on Accounts (this Committee being the historical original of the present office of Auditor of the Treasury).

A Post-Office Department (the "General Post-Office") with a "Postmaster General", a Secretary and a Comptroller, and deputies, (July 26; Nov. 8; Dec. 23, 1775): with the franking privilege to members of the Congress and to certain other Federal officials.

[23]Inglis v. Sailor's Snug Harbor, 3 Pet. 99, 121; L 7: 617. See Underhill v. Hernandez, 168 U. S. 250; S 18: 83; L 42: 456.

[24]United States v. Cruikshank, 92 U. S. 542, 553; L 23: 588; Monongahela Navig'n Co. v. United States, 148 U. S. 312, 324; S 13:

inal Jury clause of the Judiciary Article of the Constitution.[25]

(2) By the operation of the Declaration of Independence, the several late Colonies (now designated as States) became nations (in the sense, and within the contemplation, of the general Law of Nations), in so far as was consistent with the Federal Sovereignty established by the Declaration of Independence. As such nations, they severally possessed Treaty power, both inter se;[26] as between a State and the United States;[27] and as between a State and an Indian Tribe, (or nation).[28]

(3) By force of the Declaration of Independence, British allegiance and citizenship were, of course, as to the inhabitants in general, of the Colonies, terminated. The Declaration of Independence left the particulars of its operation in this field, to the principles of the Law of Nations. To the extent of the rise of Federal Sovereignty, the late British citizenship became, in general, converted into citizenship in the United States as a political unit; and, to the extent of State Sovereignty, into State citizenship; with exceptional persistence, however, of British citizenship, in certain classes of cases, according to principles of the Law of Nations.[29]

(4) Except by way of Incident to the exceptional citizenship situations just referred to,[30] the Declaration of

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622; L 37: 463; Robertson v. Baldwin, 165 U. S. 275, 281; S 17: 326; L 41: 715.

[25]Ubi supra.

[26]Robinson v. Campbell, 3 Wh. 212; L 4: 372; Hawkins v. Barney's Lessee, 5 Pet. 457; L 8: 190; Marlatt's Lessee v. Silk, 11 Pet. 1; L 9: 609; Rhode Island v. Massachusetts, 4 How. 591, 633; L 11: 1116.

See also South Carolina v. Georgia, 93 U. S. 4; L 23: 782.

Wharton v. Wise, 153 U. S. 155; S 14: 783; L 38: 669.

[27]Burton's Lessee v. Williams, 3 Wh. 529; L 4: 452; Virginia v. Tennessee, 148 U. S. 503 and 177 U. S. 501; S 13: 728; L 37: 537.

See §§ 143-149.

[28]Patterson v. Jenks, 2 Pet. 216: L 7: 402.

[29]M'Ilvaine v. Coxe's Lessee, 4 Cr. 209; L 2: 598; Dawson's Lessee v. Godfrey, 4 Cr. 321; L 2: 634.

[30]As, by incapacity, under State law, of aliens to take and hold land. Dawson's Lessee v. Godfrey, cited above; Smith v. Maryland, 6 Cr. 286; L 3: 225.

Independence had no operation upon existing private rights.[31]

(5) Subject to the operation of qualifying principles considered above, the Colony Charters continued (subject to State abrogation or alteration) as local law in and of the Colonies respectively[32]

(6) Aside from modifications and enlargements above mentioned, the Declaration of Independence had no operation upon previously established Federal law, Organic or non-Organic. July 4, after its action in respect of the Declaration of Independence, the Congress proceeded with the Order of the Day, precisely as it would have done had no Declaration of Independence been enacted. No change was thenceforth made (except in accordance with previous routine) in the Federal military or civil organizations or personnel, outside of Congress. There was no change in the course of dealings with the States or with the peoples of the States. Thenceforth, for nearly five years—that is to say, to the taking effect (March 1, 1781) of the Articles of Confederation—there was no indication of annulment, by the Declaration of Independence, of Federal law theretofore existing, except in the way of the expansion (and of the particulars accompanying expansion) above set forth.

§ 14. From the Declaration of Independence to the Taking Effect (March 1, 1781) of the articles of Confederation: (a) General View.

During the period from the taking effect of the Declaration of Independence to the taking effect (March 1, 1781) of the Articles of Confederation, the Congress continued, with expansion, the course of action of the period last above considered.[33]

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[31]Trustees of Dartmouth College v. Woodward, 4 Wh. 518; L 4: 629; Society for Promulgation of the Gospel v. New Haven, 8 Wh. 464; L 5: 662.

[32]Luther v. Borden, 7 How. 1, 35; L 12: 581.

[33]Federal Jurisdiction of suits between States, (Pennsylvania v. Virginia, Appendix to 131 U. S., p. liii).

Federal Appellate Prize Admiralty Jurisdiction over State Courts: The Thistle (Sept. 9, 1776); The Elizabeth (Sept. 12, 30, Oct. 14, 1776); The Charming Peggy (Oct. 17, 1776); the Richmond (Jan'y 4, 1777); The Phœnix (Jan'y 11, June 14, 1777); The Lydia (June 19, 1777); The Betsey (Nov. 7, 1777).

During the period (of nearly five years) now under consideration, the text of the Articles of Confederation (framed and proposed, by the Congress, at about the beginning of the period) was under consideration, by the States, severally. In the meantime, events could not await the expected adoption of that instrument; and there steadily proceeded, through the period, a broadening of Federal Unwritten Organic law, along the lines of such new features as were proposed in the instrument. The result was, that when the Articles of Confederation finally became effective, at the close of the period now in question, certain of its matter—which at the outset had been new matter—had become old matter; and, to this extent, the instrument, when it finally took effect, was merely declaratory of Federal Organic law then already (in the form of Unwritten Organic law) existing.[34]

§ 15. The Same Period:—(b) Rise of the Federal Plenary Sovereignty (Based upon Federal Area).

With the view, and for the purpose, of acquiring a fund for the payment of the great and increasing Federally-imposed indebtedness, the Congress asked for, and procured (within the period now in question) from such of the States as owned, or made claims to, the area which ultimately became the Northwest Territory, grants or re-

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See reports of decisions of the Federal Court of Admiralty Appeals, in 1 Dallas, Pennsylvania Reports, pp. 1-42; "Courts of Appeal in Prize Cases," Appendix to 131 U. S. p. xix.

Continued assumption of Federal power to bind the States in contract (Congressional pledge of State Public lands to deserters from the British forces, Aug. 14, 1776).

Elaboration of an Executive Branch; (Post Office Department further elaborated, Aug. 30, 1776; Auditor General, Apr. 1, 1776; Controller of the Treasury, Sept. 26, 1776).

Initiation of a distinct Judicial Branch, by establishment, May 14, 1780, of a Federal Court of Admiralty Appeal (from Admiralty State Courts), which took over the functions theretofore exercised by the Congress itself (with the aid of a Judicial Committee). See 1 Dal., Pa., 1-42; Appendix to 131 U. S., xix, both cited above.

For post-Constitutional retrospective recognition of power in the Congress, at the time now in question, to establish such a Court, see Penhallow v. Doane's Adm'rs, 3 Dal. 54; L 1: 507; United States v. Peters, 5 Cr. 115; L 3: 53.

[34]As in the case of the Admiralty Court of Appeals. United States v. Peters, cited above.

leases of the soil within that area,—in so far, of course, as it had not been vested in private individuals.[35]

The respective State grants (or releases) were accompanied by State cession (express or implied) to the United States, of Sovereignty over the areas granted or released. In the course of, and as a feature of, the negotiations in that field, the States, severally, and the Congress, assumed existence of Federal capacity to accept such cession of Sovereignty, and to take and to hold such area under such cession, in exclusive Federal Sovereignty. Thus arose—as matter of Federal Unwritten law—the doctrine and the fact of Federal Plenary Sovereignty (in and over Federal area). The doctrine and the fact have existed ever since, as matter of Federal Unwritten Organic law.[36]

§ 16. The Same Period:—(c) The Articles of Confederation.

Early in the period now in question, the Congress framed, and promulgated for State ratification, the text of a proposed formal Written Federal Constitution, under the designation of Articles of Confederation.[37]

During the period now under consideration, the instrument was in gradual progress of ratification; but during the period, Federal usage gradually anticipated ratification, and, in certain particulars, went beyond the instrument,[38] with the result that the instrument, when it finally took effect, not only was not exhaustive of, but lagged far behind, the actual Federal Organic law.

§ 17. From the Taking Effect (March 1, 1781) of the Articles of Confederation, to the Taking Effect (March 4, 1789) of the Constitution of the United States:—(a) The Ordinance of 1787.[39]

1. The State grants or releases to the United States, of

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[35]As to the history of the State grants or releases, see Howard v. Ingersoll, 13 How. 381; L 14: 189.

[36]§§ 39 et seq. [37]Appendix.

[38]As in the establishment (see the preceding section) of the Federal Plenary Sovereignty, based upon Federal area.

[39]The Ordinance of 1787 broadened and superseded (and, in terms repealed) the like Ordinance of 1784. For the texts of the two ordinances, see Appendix.

the Northwest Territory,[40] were upon trust for (inter alia) ultimate establishment of States within the area.[41]

This trust was, in terms recognized and declared, and, in some degree, particularized, by the Ordinance of 1787.[42]

2. So much of the Ordinance as was a Frame of Government, or a Bill of Rights, and was of local and temporary nature, was, by the terms, or by the legal effect, of the Ordinance, to become functus officio upon Statehood of any particular part of the area.[43]

3. The guarantees established by Congress in the Bills of Rights clauses of the Ordinance, and the Slavery clause, embody a broad conception of the then lately established Federal doctrine of Federal Plenary Sovereignty in and in respect of Federal area.

§ 18. The Same Period:—(b) Framing and Adoption of the Constitution of the United States.

Over a period beginning shortly prior to the Declaration of Independence, most of the States had, pursuant to approval of Congress, adopted Written State Constitutions. There was, over this period, a gradual progress of elaboration of these instruments, both within particular States, and among the States as a whole. The Constitution of Massachusetts, of 1780,[44] may be said to be representative of the most highly elaborated type of existing State Constitutions in the year 1787. In that year, at the initiation of the Continental Congress, and pursuant to a provision in the Articles of Confederation, a Convention framed the Constitution of the United States.

The text was composed, in the main by taking over bodily a large part of the text of the Articles of Confederation; by adopting the arrangement and scheme of, and by taking

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[40] § 15.

[41] See Pollard's Lessee v. Hagan, 3 How. 212: L 11: 565.

[42] As to private Equitable interests, in the soil, see Jackson v. Clark, 1 Pet. 628; L 7: 290; Hughes v. Clarksville, 6 Pet. 369; L 8: 430; Wallace v. Parker, 6 Pet. 680; L 8: 543.

See Lindsey v. Miller's Lessee, 6 Pet. 666; L 8: 538.

[43] Permoli v. First Municipality, 3 How. 589, 610; L 11: 739; Jones v. Van Zandt, 5 How. 215; L 12: 122; Strader v. Graham, 10 How. 82; L 13: 337; Cincinnati v. Louisville & Nashv. R. R., 223 U. S. 390, 401; S 32: 267; L 56: 481.

[44] Still, with some Amendments, in force.

over a large part of the text of, the Massachusetts Constitution of 1780, or (in a less degree), of other State Constitutions, and was completed by inserting such new matter as was not derivable from existing texts.[45]

During the period, July 2, 1787—March 4, 1789, the Articles of Confederation were practically viewed as remaining in force, with only such modification as was involved in the proceedings of setting the new system in motion. Even such provisions of the Constitution as were, in inherent character, self-executory (as, the Impairment Clause) were not as yet operative.[46]

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[45]For these component textual elements, see Comparative Table, Appendix.

[46]Owings v. Speed, 5 Wh. 420; L 5: 124.

PART II.

GENERAL VIEW OF THE CONSTITUTION, ORIGINALLY, AND AS NOW AMENDED.

CHAPTER IV.

THE CONSTITUTION AND THE AMENDMENTS, COLLECTIVELY: —GENERAL VIEW—PRESENCE OF UNWRITTEN ORGANIC LAW.[1]

§ 19. The Subject Generally.

1. THE TEXTUAL ASPECT.—There are two distinct textual forms of Amendment of Written law. In the first form, the Amending text in terms collocates itself with, and merges itself into, the earlier texts, and creates a new text, textually unified.[2]

In the second form, there is created no textual unity; but the operation, in law, of the Amending text upon the earlier text, is left to Interpretation.[3]

The Amendments to the Constitution are, for the most part, of the second class. Thus, Amendments I—VIII[4] left to Interpretation (and to grave controversy) the questions: (a) whether those Amendments were operative only as against Federal action, or as against State action as

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[1]For the text of the Constitution, apart from Amendments, see Comparative Table, Appendix.

[2]As, when the Amending text in terms strikes out certain words of the earlier text, and substitutes other words.

[3]There are, of course, many possible intermediate grades, between these two generically distinct forms of Amendment.

[4]I.—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

II.—A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

III.—No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

IV.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

V.—No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,

well; (b) whether, in respect of Federal action, they were operative only in State area, or in Federal area also;[5] (c) (if in some degree operative in Federal area) whether, or how far, they were operative only in Federal area within the United States proper, or in Foreign Possessions of the United States also; and (d) whether, or how far, they were operative upon Federal action in respect of, and in, strictly Foreign area.[6]

§ 20. The Constitution, Therefore, as now Amended, a Multi-Textual Instrument.

The Constitution, therefore, as it now stands, Amended, is not a textual unity, but is a multi-textual instrument, capable of unity in law only through Interpretation.

§ 21. Unity, however, in Law.

Pursuant, however, to Federally adopted[7] Common Law principles of Interpretation, as applicable to inter-related

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except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

VI.—In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

VII.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, then according to the rules of the common law.

VIII.—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[5]I. e., in intra-State Ceded Places, Territories, etc.

[6]E. g., in respect of, and in, a Consular Court, in a Foreign Country. (See § 24).

As to these several questions, and the ultimate determination of them, see succeeding Chapters of the present Book, and specific heads, as Grand Jury; Trial Jury.

[7]§§ 341-344.

texts, the original Constitution, and the Amendments, as of any particular period, are, in the aggregate, a legal unity.[8]

§ 22. Presence of Unwritten Organic Law.

The term "Unwritten law" is applicable either (a) (broadly) to law existing but not embodied in explicit text, and not as yet (or perhaps not being capable of being)[9] Judicially authenticated; or (b) (more narrowly) of law, if, when, and as, authenticated by, and embodied in, authoritative Judicial decision,[10]

Unwritten law of the former class (as of a particular period) is none the less law, by reason of its mere awaiting, at such period (or by its incapacity of) Judicial authentication,—Judicial authentication, when made, being not new law, but simply recognition of law, as existing.

§ 23. Federal Organic Law as Partly Written and Partly Unwritten.

Employing the term "Unwritten law" in these two senses distributively, we may observe (a) that the Federal Organic law (as of any particular period, past or present) in so far as represented by the original Constitution and Amendments, has been, and is, partly Written law, and partly Unwritten law; and not only so, but that (b) it has been, and is, partly Unwritten law of the former of the two classes above specified: that is to say, Unwritten law not as yet (or not capable of being)[11] Judicially authenticated; that it is, consequently, only in a qualified sense that we can speak of the Federal Organic law (as represented by the Constitution and the Amendments as of any particular period, past or present) as being Written law; and, (the propositions above stated being applicable, mutatis mutandis, to the State Constitutions), that the popular conception in this country of a generic difference in form between (a) our American Written Constitutions (Federal

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[8]See Prout v. Starr, 188 U. S. 537, 543; S 23: 398; L 47: 584.

[9]See Political Law, §§ 312, 313.

[10]I. e., existing as "case-law," colloquially so called.

[11]See note, above: Political Law.

or State) and (b) an Unwritten Constitution,[12] or a Constitution partly Written and partly Unwritten, in form,[13] goes too far, and represents a survival from the early period (approximately 1776-1790) when textual exhaustiveness and full explicitness were deemed possible and actual.[14]

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[12]As, that of Rhode Island from 1776 to 1842; see Luther v. Borden, 7 How. 1, 35; L 12: 581.

[13]As, that of Great Britain.

[14]The past and the still continuing importance of the considerations above presented are shown (a) by the contest between 1790 and (approximately) 1865, between the close construction and the liberal construction views of the Constitution of the United States; (b) by the comparatively recent controversies over the question of scope of operation of the Constitution in Foreign Possessions of the United States; and (c) by a certain degree of assertion, even to the present day, of the early view: see, for example, Arguments of Counsel, and Dissenting Opinions in respect of the potential scope of Federal Public Policy, in regard to Lotteries in interstate Commerce and the like, (cases cited §§ 431-434); see, also, generally, under Property; Equal Protection of the Laws, as to broad or narrow Interpretation of the Federal Due Process texts.

CHAPTER V.

AMENDMENTS I—X AS A BILL OF RIGHTS, OPERATIVE AS AGAINST FEDERAL ACTION.[1]

§ 24. The Subject Generally.

The Constitution, as originally framed and adopted,

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[1]I.—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

II.—A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

III.—No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

IV.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

V.—No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

VI.—In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

VII.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, then according to the rules of the common law.

VIII.—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

contained certain texts of Bills of Rights character, operative as against Federal action.[2]

These texts the framers of the Constitution deemed sufficient, as matter of Bill of Rights as against Federal action; and they did not include in (or present separately, with) the Constitution, as framed by them, a formal Bill of Rights,—thereby departing from the practically universal State practice of the period in State Written Constitutions. In so doing, they mistook—as the event proved—the general feeling of the country; and the almost immediate initiation and adoption of Amendments I—X, in response to, and in accordance with, a popular demand that had become manifest in Resolutions adopted in the State ratifying Conventions, simply made good what was popularly viewed as a defect in the original Constitution.[3]

These Amendments, therefore, collectively, constitute, with slight exceptions,[4] a Federal Bill of Rights, having no operation as against State action, but operative only as against Federal (chiefly Congressional) action.[5]

As a Federal Bill of Rights, (operative against Federal action), Amendments I—X collectively are not exclusive,

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IX.—The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

X.—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

[2]E. g., the Habeas Corpus, Attainder, and Ex Post Facto clauses of Art. I, § 9; the Jury Trial text (for Criminal causes) of Art. III, § 2, and the limitative clause of the Treason text, Art. III, § 3.

[3]As to continuing operation, up to the first ten Amendments, of the Declaration of Independence, as a Federal Bill of Rights, covering wholly or largely the field of those Amendments, see § 13, par. (1), and cases there cited.

[4]See Seventh Amendment, in its dealing (in legal effect) with finality of State Court verdicts.

[5]Of a great number of cases, we may here cite a limited number: —Hurtado v. California, 110 U. S. 516; S 4: 111; L 28: 232; Bolln v. Nebraska, 176 U. S. 83; S 20: 287; L 44: 382; Howard v. Kentucky, 200 U. S. 164; S 26: 189; L 50: 421; Walker v. Sauvinet, 92 U. S. 90; L 23: 678; Pearson v. Yewdall, 95 U. S. 294; L 24: 436; In re Sawyer, 124 U. S. 200; S 8: 482; L 31: 402; Brooks v. Missouri, 124 U. S. 394; S 8: 443; L 31: 454; Eilenbecker v. Plymouth County, 134 U. S. 31; S 10: 425; L 33: 801; Davis v. Texas, 139 U. S. 651; S 11: 675; L 35: 300; Iowa Centr. Ry. v. Iowa, 160 U. S. 389; S 16: 344; L 40: 467.

but are supplemental to the Federal Bill of Rights texts (above referred to) in the original text of the Constitution; and constitute, with such other texts, a complete Federal Bill of Rights (operative as against Federal action).

The language of these Amendments is the traditional language of American Bills of Rights, Federal and State, of the period 1776-1791—such language of that period being itself, in large part, traditional;[6] and the language of Amendments I—X is interpreted from that point of view.[7]

In so far as, in the nature of the case, capable of operation in Federal area, (intra-State or extra-State), within the United States proper, these Amendments are operative in such area.[8]

Certain particulars of Judicial Procedure, of those Amendments, are operative only in the United States proper, and not (a) in Foreign Possessions,[9] or (b) in Federal Consular Courts, or other Federal Treaty Courts, sitting in a Foreign country.[10]

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[6]E. g., of English origin prior to, and in, Magna Charta; or of early American Colonial origin.

[7]See cases, generally, cited under specific heads.

[8]As, in the District of Columbia; in intra-State Ceded or Reserved Places, generally; and in Territories within the United States proper. See Trial by Jury; Grand Jury; Common Law and Equity, and other specific heads, and cases there cited.

[9]See Grand Jury; Trial Jury, and cases there cited.

[10]In re Ross, 140 U. S. 453; S 11: 897; L 35: 581.

CHAPTER VI.

THE AMENDMENTS (I—XVII) SEVERALLY:—GENERAL VIEW.[1]

§ 25. The Subject Generally.

AMENDMENT I.[2]—In the field now in question,[3] Liberty is a matter of Common Law definition and limitation, and is subject to principles of Federal Public Policy.[4]

AMENDMENT II.[5]—The term "State" is, of course, here employed in the broad and general sense, and does not intend a State of the Union, but, if or so far as specific, intends the United States.[6]

The Amendment seems to have no relation to private carrying of weapons.[7]

AMENDMENT III.[8]—This Amendment deals only with troops in the Federal service.[9]

AMENDMENT IV.[10]—

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[1]As to Amendments I-X, see also preceding Chapter.

[2]Congress shall make no law * * * abridging the freedom of speech or of the press; * * * .

[3]As in other fields, generally; see Liberty.

[4]Gompers v. Buck Stove Co., 221 U. S. 418; S 31: 492; L 55: 797; Gompers v. United States, 233 U. S. 605; S 34: 693; L 58: 1115. See Sects. 490-496.

[5]A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

[6]Presser v. Illinois, 116 U. S. 252, 265; S 6: 580; L 29: 615: "But a conclusive" * * *

[7]Case last above cited, Opinion, passim.

[8]No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

[9]See § 24, generally.

[10]The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

See § 675.

AMENDMENT V.[11]—In its more general aspects, this Amendment has been considered in the preceding Chapters. In its specific features, it is considered elsewhere, under specific heads.[12]

AMENDMENT VI.[13]—To a certain extent, this Amendment is a re-draft of, and overlaps, a text of the original Constitution.[14]

The limitative Venue clause of the Amendment,[15] requires, in case of a crime committed in Federal area (at least in extra-State Federal area), only ascertainment previous to trial,—not ascertainment previous to the crime.[16]

AMENDMENT VII.[17]—The different features of this Amendment are considered, respectively, at other points.[18]

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[11]No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

[12]E. g., Due Process of Law; Grand Jury; Property; Liberty; Eminent Domain, etc.

In respect of the generic correspondence of its Due Process clause with the Due Process clause of the Fourteenth Amendment, see § 427.

[13]In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

[14]Art. III, § 2:—The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

[15]* * * which district shall have been previously ascertained by law * * *.

[16]Cook v. United States, 138 U. S. 157; S 11: 268; L 34: 906.

[17]In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

[18]Common Law and Equity, §§ 509-517; Jury Trial, §§ 666-668; Finality of Verdicts, §§ 658, 659; Error to State Court, §§ 796, et seq.

AMENDMENT VIII.[19]—This Amendment, in respect of fines and other punishment, would appear to add nothing to the Due Process text of the Seventh Amendment; inasmuch as the Due Process text of the Fourteenth Amendment (operative upon the States) seems to be viewed as, in legal effect, covering this ground.[20] We therefore treat of the matter elsewhere, from the point of view of Due Process in Legislative Procedure, Federal or State.

AMENDMENTS IX AND X.[21]—These Amendments seem to add nothing to the legal effect of the original Constitution, but to have been demanded and adopted merely ex industria.

AMENDMENT XI.[22]—The Judiciary Article of the Constitution vested potential Federal Judicial Jurisdiction of suits textually described as controversies "between a State and citizens of another State" * * * and "between a State * * * and foreign States, citizens or subjects." The language was verbally capable of either of two constructions (a) one not recognizing, (b) the other recognizing, liability of a State to suit by private individuals. The latter construction was adopted.[23]

Shortly thereafter, (1794) the Amendment in question was proposed; and in 1798 it took effect.

It took effect not merely in respect of future suits, but upon suits pending at the time of its adoption,[24] and, therefore, upon then existing claims not as yet in suit, against a State.

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[19]Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[20]Cases cited in § 338.

[21]The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

[22]The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against of the United States by citizens of another State, or by citizens or subjects of any foreign State.

[23]Oswald v. New York, 2 Dal. 402 and 415 (1793); L 1: 433; Chisholm Ex'or v. Georgia, 2 Dal. 419 (1793); L 1: 440.

[24]Hollingsworth v. Virginia, 3 Dal. 378; L 1:644; Chisholm v. Georgia, cited above.

AMENDMENT XII.[25]—

AMENDMENT XIII.[26]—1. The Thirteenth Amendment is of broad and sweeping operation.[27]

2. In respect of slavery proper, controversy upon this Amendment (with the exception just mentioned) been limited to certain questions of Incidental operation of it.[28]

3. A typical form of modified slavery is peonage. The terms peon, and peonage, and the institution which they represent, in this country, are derived from Spanish America. There is, however, in peonage, nothing peculiar to Spanish America. Peonage has existed from the earliest historical times. It is slavery conditioned upon existence and continuance of indebtedness. It consists of a lien upon a debtor's body and upon his labor as security for a debt. Peonage is prohibited by the Thirteenth Amendment.[29]

Holding in peonage is, by Act of Congress, an indictable crime.[30]

AMENDMENT XIV.[31]—1. The Amendment deals, in its

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[25]Amendatory of Art. II, § 1 of the Const., in respect of election of President and Vice-President. See McPherson v. Blacker, 146 U. S. 1; S 13:3; L 36:869.

[26]§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

[27]It operates upon Indian Tribes. Alberty v. United States, 162 U. S. 499; S 16: 864; L 40: 1051. (Prior to, and down to, this Amendment, African slavery had existed in certain Indian Tribes or nations. See case cited).

[28]See Contract: Consideration (§ 462).

[29]Clyatt v. United States, 197 U. S. 207; S 25: 429; L 49: 726; Bailey v. Alabama, 219 U. S. 219; S 31: 145; L 55: 191; United States v. Reynolds, 235 U. S. 133; S 35: 86; L 59: 162.

[30]As to particulars, see cases cited above.

We may observe that prior to, and apart from, the Thirteenth Amendment, Congress had, under the Bankruptcy clause of the Constitution, power of control, and of inhibition, of peonage; since status of peonage rested, in each instance, upon debt, with inability to pay; and Congress had general power, in such situation, of control, and of annulment, of indebtedness.

[31]§ 1. All persons born or naturalized in the United States, and subject, to the jurisdiction thereof, are citizens of the United States

citizenship clause, indirectly with individual Tribal Indians (in so far as they may have become citizens of the United States, and domiciled within a State), by making them, thereby, citizens of such State.

2. An Indian Tribe (or "nation") is not a "State" within the Amendment.[32]

The Amendment, in its Due Process clause, deals (a) only with action of a State, and its officials, not (b) with action of private individuals.[33]

3. In its Due Process clause, it operates (although in different modes) upon Legislative, Executive, and Judicial State action.[34]

AMENDMENT XV.[35]—The Amendment deals indirectly with Indians in that it includes within its scope such Indians as may have become citizens of the United States.

AMENDMENT XVI.[36]—This Amendment operates to take intra-State income from land out of the "direct taxes"

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and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[32]See Cherokee Nation v. Georgia, 5 Pet. 1; L 8:25.

[33]§§ 437-443. [34]§§437-443.

As to the Citizenship clause, generally, see §§ 301-303.

As to generic equivalency, in their respective spheres (Federal and State) of the Due Process clause of the Fourteenth and that of the Fifth Amendment, notwithstanding their textual differences, see §§ 425-430.

As to particulars of Interpretation of the Due Process clause of the Fourteenth Amendment, see particular heads; as: Due Process of Law; Property; Contract; Liberty; Equal Protection of the Laws; Remedy, etc.

[35]§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

See under specific heads; as: Civil Rights; Voters; Race or Color.

[36]The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

clause of the Constitution,[37] and to put Federal intra-State income tax on the footing of "taxes, duties, imposts and excises."[38]

AMENDMENT XVII.[39]—This Amendment lies largely, if not wholly, in the field of Political law.[40]

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[37]Const. Art. I, § 2:—Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers.

Ibid., § 9.—No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

[38]Const., Art. I, § 8:—

> The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

See, generally, Taxation (§§ 355-382).

[39]The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

[40]As to which, see §§ 312, 313.

CHAPTER VII.

THE CONSTITUTION (AS OF PAST PERIODS OR AS OF THE PRESENT TIME) NOT EXHAUSTIVE OF FEDERAL ORGANIC LAW.[1]

§ 26. A Multi-Textual Federal Constitution (in the Broad Sense of the Term) as of Certain Past Periods.

1. Simply for completeness, we here allude to the matter (considered at earlier points)[2] of the view that up to the taking effect of the first ten Amendments, (in their aspect of a Federal Bill of Rights), the Declaration of Independence continued in operation, as such a Bill of Rights, covering a considerable portion of the field of those Amendments. If this view be sound, the Declaration of Independence was, from the taking effect of the Constitution to the taking effect of those Amendments, one text of a multi-textual Federal Written Constitution, of which the Constitution of the United States, strictly so designated, was another text.

2. From the taking effect of the Constitution up to Statehood of the whole of the original Northwest Territory, so-called, the Ordinance of 1787 (with gradually diminishing areal scope, as State after State was established from that Territory), was, in the strictest sense, Federal Written Organic law, and was, therefore, one text of a multi-textual (or tri-textual) Federal Written Constitution.

§ 27. Unwritten Federal Organic Law.

1. There are various important propositions now Judicially established, which are most naturally to be viewed as resting not upon Interpretation of Constitutional text,[3] but rather upon the view of a passing on, into the period of the Constitution, of settled pre-Constitution doctrines of Federal Organic law: as, the doctrine of power of the

[1] We here use the term "Constitution" as including not (a) the mere letter of the Constitution, but (b) whatever has in the past been, or now is, fairly derivable from the text of the Constitution (as, at any particular period, Amended); and including, thereby, a great body of specific propositions originally matter of difficulty, but now settled by Federal Judicial decision.

[2] §§13, par. (1); 24.

[3] See first note of the preceding section.

United States to accept cession of Sovereignty over territory, and to hold and to exercise Plenary Sovereignty therein;[4] the doctrine of inter-Treaty power between the United States and a State;[5] and the doctrine of Federal Legal Tender power.[6]

2. There are various doctrines, now established, which can in a forced sense alone be said to have been derivable from the text of the Constitution;[7] and it is impossible to say that the field is now completely exhausted. Unless, therefore, a forced breadth is to be given to the conception of Interpretation, there has in the past existed, and there still exists, latent, a body of Unwritten Federal Organic law.

3. It is to be borne in mind, in this connection, that there is a broad field of Federal Organic law—included within the field of Political law[8]—from which Judicial action is barred; and that in that field, particulars of Federal Organic law not specifically and perspicuously set forth in the text of the Constitution, are, and must remain, Unwritten law, in any sense of that term; as, for example, in the case of the much-debated question whether the two-thirds requirement in respect of expulsion of a member of Congress,[9] extends to the vacating (for election frauds, and the like) of the original seating of a member.[10]

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[4]See Federal Area. [5]See under that head (§§ 143-149).

[6]Reading, for example, of the latter power into the text of the Constitution, by pre-Constitution practice, as a historical argument, (Legal Tender Cases, 12 Wall. 457, L 20: 287, Concurring Opinion, pp. 556, et seq.), appears to us a much less conservative and systematic course than adoption of the view of our text. Upon that view, the force of the dissenting Opinion in the case cited would be much weakened,—established pre-Constitutional Federal Organic law (viewed as continuing under the Constitution) providing a more definite footing than mere reasoning can ordinarily present.

[7]E. g., certain doctrines relating peculiarly to Foreign Possessions. See under that head, § 81.

[8]§§ 312, 313.

[9]Const., Art. I, § 5:—

> Each house may determine the rules of its proceeding, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member.

[10]Upon questions of this character, a considerable degree of weight, in practice, attaches to Legislative Precedent (as also, in the Executive field, to Executive Precedent); but such Precedent is not binding, in the sense of Judicial Precedent, and is often disregarded.

BOOK II.

THE THREE FORMS OF FEDERAL SOVEREIGNTY.

PART I.—The Federal Paramount Sovereignty, (Extra-State and Intra-State), Over, and in Respect of, Indian Tribes.

PART II.—The Federal Plenary Sovereignty In, and in Respect of, Federal Area, Extra-State and Intra-State.

PART III.—The Federal Sovereignty In, and in Respect of, State Area Proper.

PART I.

THE FEDERAL PARAMOUNT SOVEREIGNTY (EXTRA-STATE AND INTRA-STATE) OVER, AND IN RESPECT OF, INDIAN TRIBES.[1]

[1]As to the relative order of the Parts of Book II, see Table of Contents, Book II, ad init., note.

CHAPTER VIII.

RÉSUMÉ.

§ 28. Prior to the Constitution.

We will, in the present Chapter, collate and summarize what has been said at various other points and in various connections, upon the subject matter of the present Part.[1]

A political conception of indefinite antiquity—in its germ, we may assume, the earliest political conception—is that of Race, Tribe or other such class relation, and not a territorial area, as the political definitory feature. Under that conception, a Sovereign political society defined by a fixed territorial area, had, within its borders, nomadic or settled Tribes, of recognized quasi-Sovereignty. In the greater part of Europe, the conception and the practice now exist only in fragmentary survivals. In the United States, however,—in the case of the Indian Tribes—the conception and the practice still exist in a broad operation.

The conception and the practice, in North America, among white men, began almost immediately upon the first settlements. They were in full force—as British law and practice, and as Colony law and practice—at the time of the Revolution. Upon the establishment of American Independence, this field of law and of practice was recognized as having vested exclusively or predominantly in the United States; the United States, as successor to Great Britain, became the Paramount Sovereign of the Indian Tribes, intra-State and extra-State; the Tribes became servient nations,—of limited Sovereignty, but nations, nevertheless, within the view of the Law of Nations.

This view involved, as an incident, Treaty-making capacity, as between the United States and an Indian Tribe.[2]

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[1]For a historical review of the subject, see Opinions in Cherokee Nation v. Georgia, 5 Pet. 1; L 8: 25; Worcester v. Georgia, 6 Pet. 515; L 8:483; United States v. Forty-Three Gallons of Whiskey, 93 U. S. 188; L 23: 846.

[2]Worcester v. Georgia, cited above (dealing with pre-Constitution Indian Treaties).

Although nations, the Indian Tribes were not Foreign nations, in the sense of the Law of Nations, but were domestic dependent nations.[3]

The doctrines above stated were constantly acted upon by the United States during the period preceding the taking effect (March 4, 1789) of the Constitution of the United States.

§ 29. The Constitution.

The Constitution makes no specific textual reference to the matter in question. It deals with it indirectly as follows:

(1) Its specific Treaty provisions were operative upon Indian Treaties whether made prior to the Constitution, or thereafter to be made, and made them Law of the Land, in State area, and in extra-State area, alike.[4]

(2) The then present, and then future, presence of settled Indian Tribes, within the limits of one or another State, but outside the field of State action, was recognized,[5] as it still is recognized.[6]

(3) The Constitution gave, in terms (or recognized and declared) power in Congress "to regulate commerce * * * with the Indian Tribes."

(4) Certain Judicial Procedure provisions of the original Constitution and of Amendments, are not operative in respect of Indian Tribes.[7]

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[3]Cherokee Nation v. Georgia, cited above (a case interpretative of the Constitution, but involving, retrospectively, the proposition of the text).

[4]§§ 314-322.

[5]Constitution, Art. I, § 2:—

> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.

[6]Fourteenth Amendment, § 2:—

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

[7]See Grand Jury; Jury Trial.

CHAPTER IX.

Elaborations and Applications, Under the Constitution, of These Principles.

§ 30. General Statement.

Since the adoption of the Constitution, the principles above stated have been elaborated and applied in great variety (a) in and by Indian Treaties; (b) in and by, or under, Acts of Congress; and (c) in and by Federal Judicial decisions.

It is not within the scope of the present Treatise to deal with this field in detail. We will simply—in succeeding sections—cite typical illustrative examples.

We may here observe that particular requirements of the Constitution, or of Amendments, in respect of Judicial Procedure, are not operative in respect of Indian Tribes or their members: as, in the case of Jury and Grand Jury provisions.[1]

§ 31. Treaty.

The practice of Indian Treaty has been maintained on an extensive scale. The boundary-lines, and the actual jurisdiction of, numerous States, and a vast number of private land-titles, rest, in the last resort, upon, and are defined by, Indian Treaties.[2]

Thus, an Indian fishery right in a river may exist in a State formed out of Federal area; limiting, pro tanto, the Sovereignty of the State.[3]

Title to land may pass to an Indian by Treaty.[4]

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[1]Talton v. Mayes, 163 U. S. 376; S 16: 986; L 41: 196 (a case upon the grand jury feature of the Fifth Amendment, but pertinent to the original Constitution).

[2]Fellows v. Blacksmith, 19 How. 366; L 15: 684; New York Indians v. United States, 170 U. S. 1; S 18: 531; L 42: 927; United States v. New York Indians, 173 U. S. 464; S 19: 464; L 43: 769.

[3]United States v. Winans, 198 U. S. 371; S 25: 662; L 49: 1089; so of a reservation to Indians of water rights in a river. Winters v. United States, 207 U. S. 564; S 28: 207; L 52: 340.

[4]Jones v. Meehan, 175 U. S. 1; S 20: 1; L 44: 49; Francis v. Francis, 203 U. S. 233; S 27: 129; L 51: 165.

§ 32. Indian Reservations in New States.

In the creation, from Federal area, of new States, Congress has, in many instances, reserved, from State Sovereignty, portions occupied by Indian Tribes.[5]

In such case, the Federal Sovereignty extends broadly to white men acting within such Reservation.[6]

In various such instances, the Federal reservation of Sovereignty has not been full and exhaustive; but has placed such Reservations and their (Indian) inhabitants within the Sovereignty of the State, except in matters peculiarly of Indian character. In such case, the State has, for example, been given jurisdiction (and exclusive jurisdiction) over crimes committed, in such a Reservation, by white men against white men.[7]

The United States may reserve Jurisdiction over crimes committed in such a Reservation by Indians who may have become citizens of the United States, and of the State within which the Reservation may lie.[8]

§ 33. Congressional Legislation of Intra-State Operation.

Congress has legislated broadly in respect of intra-State (as well as extra-State) area, under the Federal Paramount Sovereignty over and in respect of Indians. It has penalized sales within State area proper (outside of Federal Indian Reservations) of intoxicating liquor to Tribal Indians,[9] and the introduction, from State area proper,

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[5]See United States v. Kagama, 118 U. S. 375; S 6: 1109; L 30: 228.

[6]Worcester v. Georgia, 6 Pet. 515; L 8: 483; United States v. Forty-Three Gallons of Whiskey, 93 U. S. 188; L 23: 846; Dick v. United States, 208 U. S. 340; S 28:399; L 52:520; Donnelly v. United States, 228 U. S. 243; S 33:449; L 57:820; 228 U. S. 708; S 33:1024; L 57:1035; United States v. Sandoval, 231 U. S. 28; S 34: 1; L 58: 107; United States v. Pelican, 232 U. S. 442; S 34: 390; L. 58: 676; Perrin v. United States, 232 U. S. 478; S 34:387; L 58:691; Provonost v. United States, 232 U. S. 487; S 34:391; L 58:696.

[7]United States v. McBratney, 104 U. S. 621; L 26: 869; Draper v. United States, 164 U. S. 240; S 17: 107; L 41: 419.

[8]Cases cited above. See also succeeding sections.

[9]United States v. Holliday, 3 Wall. 407; L 18: 182.

into Federal intra-State Indian Reservations, of such liquor, even by white men.[10]

So, in other fields: as, that of Contract.[11]

§ 34. Change from Tribal Status to Citizenship.

Tribal Indians are constantly being vested by Congress with Federal citizenship.[12]

Tribal status, however, is not lost, but Federal (Paramount) Sovereignty over individuals in question continues.[13]

§ 35. Tribes of High Internal Organization.

In certain Indian Tribes there long existed, under Acts of Congress, a domestic political organization akin to that of our most highly organized Federal Territories of the past and of the present. Such organization did not affect the generic political status of such Tribes or of their members.[14]

§ 36. Citizenship and Private Land Title.

The question of individual land title, and the question of citizenship (Federal or Federal and State), are distinct and separate questions. Congress frequently provides for continuance, after vesting of citizenship, of a certain degree of tutelary power over intra-State land alloted to an Indian in severalty.

The mere fact of citizenship does not necessarily involve power to sell such land.[15]

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[10]Cases first cited in the preceding section; United States v. Wright, 229 U. S. 226; S 33: 630; L 57: 1160.

[11]Sage v. Hampe, 235 U. S. 99; S 35: 94; L 59: 147.

[12]And, thereby, where they are inhabitants of States, into State citizenship (Fourteenth Amendment); and with the protection of the Fifth Amendment.

[13]United States v. Nice, 241 U. S. 591; S 36: 696; L 60: 1192, overruling Matter of Heff, 197 U. S. 488; S 25: 506; L 49: 848.

[14]United States v. Forty-Three Gallons of Whiskey, 93 U. S. 188; L 23: 846; Heckman v. United States, 224 U. S. 413, 428; S 32: 424; L 56: 820.

[15]Tiger v. Western Investment Co., 221 U. S. 286; S 31: 578; L 55: 738; Hallowell v. United States, 221 U. S. 317; S 31: 587; L 55: 750.

§ 37. Adoption into a Tribe:—Creation thereby of Tribal States.

One who is not by birth an Indian may (in the absence of affirmative Federal action to the contrary, and in general, as the Federal law now stands), be adopted by and into a Tribe, and thereby acquire Indian status.[16]

§ 38. Federal Power of Direct Government.

It is competent to Congress to provide directly particulars of law, Civil and Criminal, for Indian Tribes, and for Judicial Jurisdiction in Federal Courts.[17]

Various matters of internal importance have, however, thus far, been left to Tribal power and Tribal dealing.[18]

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[16]Lucas v. United States, 163 U. S. 612; S 16: 1168; L 41: 282.

[17]United States v. Kagama, 118 U. S. 375; S 6: 1109; L 30: 228; In re Mayfield, 141 U. S. 107; S 11: 939; L 35: 638, and cases there cited; Lucas v. United States, 163 U. S. 612; S 16: 1168; L 41: 282; other cases cited in this Chapter.

[18]See United States v. Quiver, 241 U. S. 602; S 36: 699; L 60: 1196.

PART II.

THE FEDERAL PLENARY SOVEREIGNTY IN, AND IN RESPECT OF, FEDERAL AREA, EXTRA-STATE AND INTRA-STATE.[1]

[1]As to the relative order of the Parts of Book II, see Table of Contents, Book II, ad init., note.

CHAPTER X.

Principles of General Character.

§ 39. The Specific Constitutional Text.[1]

1. The term "Territory" was, in the text cited, employed primarily in the sense of land, as land; and with reference to that vastly predominant proportion of land in Federal area, not, in 1787-9 in private ownership;[2]—the land specifically in mind, in the framing of this text being, of course, land within the Northwest Territory.

The earlier portion of the text is hardly more than declaratory of the general principle of Congressional power of care and of disposal of land, extra-State or intra-State, belonging to the United States.[3]

It may, however, have been introduced to meet a possible contention to the effect that the United States, being bound by a trust ultimately to establish Statehood in the Northwest Territory,[4] was under obligation to hold and retain land in that area, not privately owned; and to convey it, as land, to States created from that area.

2. The text cited recognizes the Federal Sovereignty (carried over from the pre-Constitution period) in Federal area.[5]

3. Apart from actual private ownership, as of a particular period, the United States, in respect of such land as is now in question, may make disposal of it in any form: as, by lease or license;[6] by land grant for projected rail-

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[1]Art. IV, § 3:—

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

[2]United States v. Gratiot, 14 Pet. 526, 537; L 10: 573.

[3]See §§ 111-115; 116-121. [4]See Northwest Territory.

[5]See § 15. [6]United States v. Gratiot, cited above.

roads;[7] or in satisfaction of unalloted grants of a prior Sovereignty.[8]

The power extends to land flowed by tidal waters.[9]

§ 40. Absence of Federal Organic Requirement of Uniformity as among Different Federal Areas.

Congressional legislation, of local operation, for Federal areas, and locally established laws of such areas, are not required by the Federal Organic law to be uniform as among different such areas.[10]

§ 41. Inter-Relation of General, and Local, Federal Law, in Federal Areas.

As a result of the Federal policy of localization of Federal law, in and according to different Federal areas, there prevail, broadly, within every Federal area, two distinct bodies of Federal law: the one dealing with matters purely or predominantly of local interest and concern; the other, with matters purely or predominantly of general Federal interest and concern.

Thus, a contract to which the United States is a party, made in a Federal area, is governed, not by features of local Contract law prevailing within that area, but by the general principles of the Common Law of Contract.[11]

Unlawful refusal to testify in the District of Columbia, before a Committee of Congress, in respect of matters not of local concern, has been made an offence triable and punishable in the District of Columbia.[12]

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[7]Atlantic and Pac. R. R. v. Mingus, 165 U. S. 413; S 17: 348; L 41: 770.

[8]Shaw v. Kellogg, 170 U. S. 312; S 18: 632; L 42: 1050.

[9]Shively v. Bowlby, 152 U. S. 1; S 14: 548; L 38: 331.

[10]Binns v. United States, 194 U. S. 486 (a case of a local license tax); S 24: 816; L 48: 1087; Serralles' Succession v. Esbri, 200 U. S. 103; S 26: 176; L 50: 391 (local money system). See Equal Protection of the Laws, (§§ 497-499).

[11]Trist v. Child, 21 Wall. 441; L 22: 623; Atlantic, Gulf & Pac. Co. v. Philippine Islands, 219 U. S. 17; S 31: 138; L 55: 70. See §§ 408, 409.

[12]In re Chapman, 166 U. S. 661; S 17: 677; L 41: 1154.

See also, Crawford v. United States, 212 U. S. 183; S 29: 260; L 53: 465 (a case of prosecution in the District of Columbia for an offense against general Federal Criminal law).

In State area proper, an act may have a two-fold aspect: (a) of a crime against a State; and (b) of a crime against the United States.[13]

In Federal area, since there is but a single Sovereignty, no corresponding situation exists. That is to say, an act violative (a) of locally established penal law of a specific organized Federal area and also (b) of general Federal penal law, is, in either aspect, a crime against the United States.

This principle receives application in, and is illustrated by, the proposition that a conviction by a Federal general Military Court, sitting within a particular Federal State, is a bar to subsequent Criminal prosecution (based upon the same act) in a local Civil (non-Military) Court.[14]

§ 42. All Federal Area Law as, in a Broad Sense, Law of the United States.

Notwithstanding the distinctions above referred to, created by Congress, between general law, and local law, of a Federal area,—nevertheless, in a broad sense, all such law is law of the United States.[15]

That is to say, it is only by, and to the extent of, Congressional action, that a material distinction between local and general law, in a Federal area, exists.[16]

§ 43. Essential Unity of all Federal Law in a Federal Area.

Notwithstanding the division of the Federal law, within a Federal area, into two bodies of law,—local and general,—an essential unity exists: in that both bodies of law are of the same ultimate sanction. Thus, an act committed in a Federal area, violative, in character, both of local Criminal law, and of the general Federal Military law, is essentially a single offence; and its liability to prosecution and punishment, under either the local law, or the general

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[13] § 521, par. 3.

[14] Grafton v. United States, 206 U. S. 333; S 27: 749; L 51: 1084.

[15] Thompson v. Roe, Lessee of Carroll, 22 How. 422; L 16: 387; District of Columbia v. Bailey, 171 U. S. 161, 176; S 18: 868; L 43: 118; Atchison, T. & S. F. Ry. v. Sowers, 213 U. S. 55; S 29: 397; L 53: 695; El Paso etc. Ry. v. Gutierrez, 215 U. S. 87; S 30: 21; L 54: 106.

[16] As to such law as being, or as not being, law of the United States in the narrow (Federal question) sense, see § 682, par. 2; § 683, par. 9.

Military law, at the option of the United States, is mere matter of procedure. This conclusion results from the doctrine that an acquittal by a Federal Court Martial is a bar to a local prosecution based on the local Criminal law.[17]

§ 44. Power and Practice of Congressional Adoption, for a Federal Area, of Law of a State.

It has been common for Congress, by enactment in general terms, to adopt for, and apply to, a Federal area, the existing laws of some State. Such an enactment carries with it into the area (under a familiar principle), not merely the statute law, but the general legal system of the State, and existing Judicial Precedent in decisions of the Courts of such State.[18]

There is no distinction, in this respect, between Civil and Criminal law.[19]

§ 45. Existing Law of Newly Acquired Federal Area.

1. In accordance with a familiar doctrine of the Law of Nations, Foreign area, acquired as Federal area of any class, brings with it—in absence of affirmative provision to the contrary, and subject to a qualification stated below—the local law of the area, existing at the time of Federal acquisition.[20]

As an incident of the change of Sovereignty, such law ceases to be "foreign law," in the technical sense of that term, and becomes domestic law (local law of the Federal area).[21]

2. The qualification above referred to is as follows: Where such law is in any part inconsistent (a) with Fed-

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[17]Grafton v. United States, 206 U. S. 333; S 27: 749; L 51: 1084. (The defence was rested upon the autrefois acquit provision of the so-called Philippine Bill of Rights).

[18]Robinson & Co. v. Belt, 187 U. S. 41; S 23: 16; L 47: 65; Kealoha v. Castle, 210 U. S. 149; S 28: 684; L 52: 998.

[19]Franklin v. United States, 216 U. S. 559; S 30: 434; L 54: 615.

[20]Ponce v. Roman Cath. Church, 210 U. S. 296; S 28: 737; L 52: 1068; Honolulu Transit Co. v. Wilder, 211 U. S. 137; S 29: 44; L 53: 121.

See Perez v. Fernandez, 202 U. S. 80; S 26: 561; L 50: 942; Ortega v. Lara, 202 U. S. 339; S 26: 707; L 50: 1055; Garrozi v. Dastas, 204 U. S. 64; S 27: 224; L 51: 369.

[21]It is, for example, Judicially known to the Federal Courts, of all characters and of all classes. Cases above cited.

eral Organic law operative in respect of it; or (b) with Federal non-Organic law of general aim and scope; or (c) with Federal policy of law, the presumption of Federal adoption and continuance of it, fails, and such part ceases to exist as law.[22]

3. The principles above stated are applicable to the case of conversion of State area proper into Federal area: as, in the case of cession by Maryland and Virginia of area for the Federal Seat of Government.[23]

§ 46. Incidental Federal Adoption of Judicial Precedent.

When, in any form,[24] there is adopted, as local law of a Federal area, law of another political society, the general rule applies, of presumptive adoption (as an Incident) of pertinent Judicial Precedent of the parent area.[25]

§ 47. Presumption of Existence (as Local Law) of the Common Law.

In a Federal area, not of exceptional historical origin, the Common Law presumptively prevails,[26] unless, or until, altered, either (a) by Congress, or (b) by local action under delegated power.

There is no distinction, in this respect, between Civil and Criminal law.[27]

§ 48. Operation of General Law, as Repeal of Local Federal Law.

It not infrequently happens that a general Act of Congress is not to be harmonized with the local law, of a Federal area, or of a class of such areas. In such case, the

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[22]As in the case of the doctrine of law, prevailing in Porto Rico under the Spanish rule, that a public office, or its emoluments, may be private property. Sanchez v. United States, 216 U. S. 167; S 30: 367; L 54: 432.

See Romeu v. Todd, 206 U. S. 358; S 27: 724; L 51: 1093; Bosque v. United States, 209 U. S. 91; S 28: 501; L 52: 698; Ker v. Couden, 223 U. S. 268; S 32: 284; L 56: 432.

[23]Korn v. Mutual Assurance Soc'y, 6 Cr. 192; L 3: 195; Mutual Assurance Soc'y v. Watts's Ex'or, 1 Wh. 279; L 4: 91. See § 78.

[24]E. g., by Acquisition of Foreign area, or by Congressional adoption for a Federal area of State law.

[25]Robinson & Co. v. Belt, 187 U. S. 41; S 23: 16; L 47: 65.

[26]Huntley v. Kingman, 152 U. S. 527; S 14: 688; L 38: 540.

[27]Franklin v. United States, 216 U. S. 559; S 30: 434; L 54: 615.

general Act is viewed as a repeal, pro tanto, of such local law.[28]

§ 49. Congressional Power of Taxation in Specific Federal Areas, Severally.

Congress may directly, by its own action, tax any specific Federal Area (without regard to other Federal Areas) for local requirements, (as determined by Congress), of maintenance (as fixed by Congress) of local government of such Area,[29] and for general purposes of the Realm.[30]

§ 50. Acquisition of Strictly Foreign Area as Federal Area: Incorporation by Treaty, into the United States.

It is competent to the Federal Treaty-making authority, in acquiring strictly Foreign area, not to acquire such area as a Foreign Possession of the United States, but to incorporate such area, as of and from taking effect of the Treaty, in this respect, into the United States.[31]

§ 51. Intra-State Operation of the Federal Plenary Sovereignty.

While the Federal Plenary Sovereignty, in its primary aspect, is based upon, and is limited to, Federal areas, and does not, in this aspect, exist in State area proper, as such, it has, nevertheless, in State area proper, an important secondary and incidental operation. The general doctrine of the matter may be stated as follows: In as far as is necessary or convenient to the exercise of the Federal Plenary Sovereignty, that Federal Sovereignty exists and

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[28]El Paso etc. Ry. v. Gutierrez, 215 U. S. 87; S 30: 21; L 54: 106.

[29]Binns v. United States, 194 U. S. 486; S 24: 816; L 48: 1087.

[30]Loughborough v. Blake, 5 Wh. 317; L 5: 98.

[31]As in the case of Texas; Hawaii; the Louisiana Purchase; and of Alaska. In such situation, the Constitution of the United States takes operation, in such area, to the same effect as in other Federal area within and part of the United States: with the result, for example, of right of Common Law jury trial in Criminal cases, and incapacity of Congress to provide for a jury of less than twelve. Rasmussen v. United States, 197 U. S. 516; S 25: 514; L 49: 862 (Alaska).

Acquisition, and incorporation into, the United States, may proceed by stages, certain features of Federal law (as, Constitutional right of trial by jury), becoming operative at a stage later than that of other features. Hawaii v. Mankichi, 190 U. S. 197; S 23: 787; L 47: 1016.

prevails in State area proper, along with, and supplemental to, and expansive of, the primary intra-State Federal Sovereignty.

Applications of the doctrine have been made (and the proper definition and delimitation of the doctrine are thereby indicated) as follows:

It was held competent to Congress, in establishing in the Seat of Government (the District of Columbia), a municipal lottery for municipal improvements, to provide for the sale of tickets in State area proper, even where there was a State policy of law to the contrary; with the effect of Federal repeal, pro tanto, of State laws forbidding and penalizing the sale of lottery tickets.[32]

The United States may, within a State, hold a Federal Court for the indictment and trial of offences committed in a Federal area; and, as a necessary incident, may summon jurors and witnesses from within State area.[33]

So, Federal Appellate Courts, in a State, may be given Jurisdiction of Appeals from Federal areas.[34]

The intra-State power of the Plenary Sovereignty includes power of Federal intra-State taxation for requirements of the Plenary Sovereignty (that is, for requirements of Federal area).[35]

The States, severally, are, by action of Congress, subject to law of Privileges and Immunities, of domestic Extradition, and of Faith and Credit to judgments and records, in favor of Federal area.[36]

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[32]Cohens v. Virginia, 6 Wh. 264, 423-430; L 5:257 (on the motion to dismiss).

[33]United States v. Celestine, 215 U. S. 278; S 30: 93; L 54: 195; United States v. Sutton, 215 U. S. 291; S 30: 116; L 54: 200; The Cherokee Tobacco, 11 Wall. 616; L 20:227; Caha v. United States, 152 U. S. 211; S 14:513; L 38:415.

[34]Laurel Oil Co. v. Morrison, 212 U. S. 291; S 29:394; L 53:517.

[35]This principle is in familiar operation in Federal intra-State taxation.

[36]§§ 213-219; 293, 294; 644-650.

As to pre-Constitution origin of the doctrine, see §§ 12-18, and, in particular, as to the Ordinance of 1787.

CHAPTER XI.

ORGANIZED FEDERAL AREAS:—"FEDERAL STATES."

§ 52. The General Principle.

A specific portion of Federal area may be Organized, or not Organized. Organization consists in the setting apart of a specific portion of Federal area, as a distinct political society.[1]

Federal areas, of this class, we characterize, in general, as "Federal States."[2]

§ 53. The Terms "Territory," and "State," in Respect of Organized Federal Areas.

1. "TERRITORY."—Prior to the War with Spain, the use of the term "Territory," in respect of organized Federal areas, had, from the nature of the case, been confined to extra-State area within, and part of, the United States. That limitation has now disappeared. Thus, Porto Rico, although a Foreign Possession, and not part of the United States, is designated a "Territory."[3]

2. "STATE."—In the general sense of the word "State," the several organized Federal areas are States, (although not States of the Federal Union); and they are sometimes so characterized in the Federal law. Thus, an Act of Congress permitting the taxation of shares of national banks by a "State," is construed to include, under that term, an organized Territory.[4]

Indeed, such a Federal area is sometimes characterized, in the Federal law, as (for certain purposes) one of the "States of the Union." Thus, the District of Columbia is held to be one of the "States of the Union" within the meaning of the so-called Consular Convention of 1853 between the United States and France, providing for equal-

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[1]I. e., as a "State" in the broad sense.

As to pre-Constitution origin of the doctrine and pre-Constitution practice, see Northwest Ordinance.

[2]See § 53.

[3]Kopel v. Bingham, 211 U. S. 468; S 29: 190; L 53: 286.

[4]Talbott v. Silver Bow County, 139 U. S. 438; S 11: 594; L 35: 210.

ity of rights of citizens of France with citizens of the United States "in all the states of the union."[5]

§ 54. Indian Tribes.

A settled Indian Tribe, in an area (or reservation) of its own, may be viewed as, to certain intents, a Federal State.[6]

§ 55. "Organic Acts."

An Act of Congress, establishing and organizing a Federal State, is commonly called the "Organic Act" of the State, and is a sort of Constitution for the Federal State, not being alterable by the Territory, although alterable by Congress; and being, therefore, for the Federal State, law to which (as, in a higher degree, to the Constitution of the United States), all local legislation must conform.[7]

A local Act may be severable; and one provision may be valid, and another (by conflict with the Organic Act) invalid.[8]

§ 56. Delegation, by Congress, of Local Governmental Powers.

It is competent to Congress to delegate, to a very considerable extent, to the inhabitants of any given portion of Federal area, local governmental power. Organization is,

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[5]Geofroy v. Riggs, 133 U. S. 258, 262; S 10: 295; L 33: 642. See also, Metropolitan R. R. v. District of Columbia, 132 U. S. 1, 9; S 10: 19; L 33: 231; Hepburn v. Ellzey, 2 Cr. 445, 452; L 2: 332; Bank of Alexandria v. Dyer, 14 Pet. 141, 146; L 10: 391; Cherokee Nation v. Georgia, 5 Pet. 1; L 8: 25. See, as to a narrower use of the term "State", Wynne v. United States, 217 U. S. 234; S 30: 447; L 54: 748 (Hawaii).

[6]Holden v. Joy, 17 Wall. 211, 242; L 21: 523.

Such a Tribe is not, however, a "State" within the meaning of the Judiciary Article of the Constitution. Cherokee Nation v. Georgia, 5 Pet. 1; L 8: 25.

[7]National Bank v. County of Yankton, 101 U. S. 129, 133; L 25: 1046; Clayton v. Utah Territory, 132 U. S. 632; S 10: 190; L 33: 455; Guthrie Bank v. Guthrie, 173 U. S. 528; S 19: 513; L 43: 796. Thus, in Ferris v. Higley, 20 Wall. 375; L 22: 383, it was held that the Organic Act of a Territory, in granting authority for the establishment of Common Law, Chancery and Probate Courts, had made a fixed distinction, according to the Common Law definitions; and that, therefore, a Territorial Act, vesting Criminal Jurisdiction in a Probate Court, was in violation of the Organic Act, and, therefore, null and void.

[8]Clayton v. Utah Territory, cited above.

in practice, accompanied, in general, by delegation of such power; but Organized status exists, in some instances, without such delegation of power.[9]

Organized status, with or without such delegation of local power, is not limited, by Federal Organic law (and is not limited in practice) to the United States proper, but may be established in a Foreign Possession of the United States.[10]

§ 57. The Question of the Potential Scope of Such Delegation of Power.

The potential scope of such delegation is not capable of particular and exact doctrinal statement. It may be defined, in general terms, as extending to matters primarily of pure local concern. It includes power of local taxation, for local purposes;[11] power over Marriage and Divorce;[12] power over descent and succession and the like;[13] power over the matter of the form of capital punishment;[14] power of creation of corporations;[15] power of escheat of land, to the Federal State in question, or to a political subdivision thereof, for locally adjudicated lack of heirs;[16] power of establishment of Courts, and of fixing of their jurisdic-

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[9]As in the District of Columbia (q. v.).

See Interstate Com. Comm. v. Humboldt S. S. Co., 224 U. S. 474; S 32:556; L 56:849.

[10]Kopel v. Bingham, 211 U. S. 468; S 29: 190; L 53: 286.

[11]Linford v. Ellison, 155 U. S. 503; S 15: 179; L 39: 239; Murphy v. Utter, 186 U. S. 95; S 22: 776; L 46: 1070; Copper Queen Co. v. Arizona, 206 U. S. 474; S 27: 695; L 51: 1143.

[12]Maynard v. Hill, 125 U. S. 190; S 8: 723; L 31: 654. See De La Rama v. De La Rama, 201 U. S. 303; S 26: 485; L 50: 765.

[13]Cope v. Cope, 137 U. S. 682; S 11:222; L 34:832 (inheritance of illegitimate children, from father Judicially ascertained).

[14]Wilkerson v. Utah, 99 U. S. 130; L 25: 345.

[15]Vincennes University v. Indiana, 14 How. 268; L 14: 416.

Where there is no specific provision, this power is easily implied. Thus, where Congress set apart land in a Territory for a seminary of learning, it was held competent to the Territory to incorporate a University to take the land. (Case cited).

[16]Christianson v. King County, 239 U. S. 356; S 36: 114; L 60: 327.

tion;[17] power of broad regulation of Judicial Procedure;[18] power of abolition of existing broad Common Law doctrines of real estate title;[19] and, in general, the regulation of land title;[20] power, a fortiori, over personal rights of action;[21] and power of definition, to a certain extent, of the Congressional delegation of power.[22]

Congress may reserve any given phase to itself, and delegate the remainder. It may, for example, directly establish and maintain Courts with jurisdiction over controversies arising under the Constitution and the general laws of the United States, or over controversies arising under Territorial laws, with Judges appointed by the President,[23]

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[17]Clough v. Curtis, 134 U. S. 361; S 10: 573; L 33: 945; American Ins. Co. v. Canter, 1 Pet. 511; L 7: 242. (Territorial Admiralty Court).

[18]Beall v. New Mexico, 16 Wall. 535; L 21: 292. (Territorial legislation, under the usual form of Organic Act, may provide that if appeal bond, with surety, be given, and judgment be against the appellant, it shall operate against the sureties). So, a Territorial Legislature may provide for specific questions to the jury, in a Common Law action. Walker v. New Mexico & So. Pac. R. R., 165 U. S. 593; S 17: 421; L 41: 837.

[19]E. g., of abolition, in futuro, of riparian rights in a non-navigable stream, with substitution therefor of a rule of earliest appropriation of the water. Boquillas Cattle Co. v. Curtis, 213 U. S. 339; S 29: 493; L 53: 822. So, as to appropriation of water, generally. Arizona Copper Co. v. Gillespie, 230 U. S. 46; S 33: 1004; L 57: 1384.

[20]As, in the matter of a Statute of Frauds, (Halsell v. Renfrow, 202 U. S. 278; S 26: 610; L 50: 1032); and in the matter of mining easements, mine development, and kindred matters (Sparrow v. Strong, 3 Wall. 97; L 18: 49); and power of recognition and validation, ab initio, of a system of easements which has come into existence informally, and without authority of law, but by common consent and spontaneous action of an unorganized community, in the absence of effective governmental provision. Sparrow v. Strong, cited above.

[21]Atchison, T. & S. F. Ry. v. Sowers, 213 U. S. 55; S 29: 397; L 53: 695 (legislation as to liability for personal injuries).

[22]See Guthrie Bank v. Guthrie, 173 U. S. 528; S 19: 513; L 43: 796. In this case, the Organic Act of a certain Territory prohibited, in terms, special legislation. The Supreme Court—acting upon what appeared to be the intent of Congress—accepted, and followed, a decision of the highest Court of the Territory, to the effect that the creation of a special tribunal to try and enforce claims founded in natural justice, but not legally binding, against local municipalities, was not special legislation within the meaning of the Organic Act.

[23]City of Panama, 101 U. S. 453; L 25: 1061.

and with jurisdiction over Admiralty cases;[24] or it may establish, within and for such a Federal area, Courts having jurisdiction over controversies arising directly under the Constitution and general laws of the United States, and grant to the Territory power to establish other Courts, for controversies arising under Territorial laws: with corresponding provision for the appointment, terms, and duties of the Judges, clerks and law officers of, or connected with, the two classes of Courts;[25] or, in general, leave particulars to be provided for by supplemental local legislation,[26]—power of such supplemental legislation being presumptively granted, in the absence of Congressional provision to the contrary.[27]

It is not competent to Congress to delegate to a Federal area power of regulation of Commerce between the States, or between a State and such Federal area.[28]

Such a Federal area has, presumptively, power of taxation of a local railroad established by Congress within the area.[29]

§ 58. Implied Limitation by Federal Policy of Law.

A Congressional delegation of local power is subject to a variety of qualifications based upon Federal Policy of Law.[30]

§ 59. The Practice of Subjection to Approval by Congress.

An Organic Act often contains a provision that local Acts, if disapproved by Congress, "shall be null and of

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[24]City of Panama, cited above; Steamer Coquitlam v. United States, 163 U. S. 346; S 16: 1117; L 41: 184.

[25]Snow v. United States, 18 Wall. 317; L 21: 784.

[26]Scully v. Squier, 215 U. S. 144; S 30: 51; L 54: 131.

[27]Scully v. Squier, cited above.

[28]Stoutenburgh v. Hemmick, 129 U. S. 141, 149; S 9: 256; L 32: 637.

[29]Murphy v. Utter, cited above.

[30]Thus, it is violative of a general Federal policy of Comity, for the local authority of a Federal area (under a delegation in general terms), to provide in respect of a class of personal causes of action arising within such area, that suit can be brought thereon only in the Courts of the area, to the exclusion of Courts of other Federal areas and of State courts. Atchison, T. & S. F. Ry. v. Sowers, 213 U. S. 55; S 29: 397; L 53: 695.

no effect"; or that all such Territorial Acts shall be submitted to Congress, and, if disapproved, "shall be null and of no effect." Even the latter form of expression is construed as intended to invalidate such Territorial legislation, (if otherwise valid), not ab initio, but only from the time of disapproval.[31]

§ 60. Congressional Revocation of Delegation of Local Powers.

Delegation of power to (or to Federal officials in respect of) a Federal area, is nothing but legislation, and partakes in no degree of the feature of grant, or contract; and it may be revoked, in all or in certain particulars, by Congress, at will.[32]

§ 61. Retroactive Delegation—Validation.

Congress may retroactively validate local action inconsistent, when originally taken, with Federal law.[33]

§ 62. Federal Area Within Federal Area.

It has been a common practice with Congress, in establishing a specific Organized Federal Area with delegated powers of local government, to except, within the outer boundary lines, a certain portion, with a different plan of local government therefor.[34]

§ 63. Assimilation to Statehood Status.

The uniform policy of Congress has been to put Federal States of delegated local representative government, upon the footing,—as far as it is legally possible, and as far as is deemed practicable—of States of the Union. This policy may be said to rest upon two grounds: first, regard for

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[31]Atchison, T. & S. F. Ry. v. Sowers, 213 U. S. 55; S 29: 397; L 53: 695; Miners' Bank v. Iowa, 12 How. 1; L 13: 867.

[32]National Bank v. County of Yankton, 101 U. S. 129; L 25: 1046. The annulment power of Congress extends to the annulment of a lawful Territorial Act of Incorporation of a religious or charitable corporation. Mormon Church v. United States, 136 U. S. 1; S 10: 792; L 34: 478.

[33]National Bank v. County of Yankton, 101 U. S. 129; L 25: 1046.

As to such congressional power, in general, see §§ 333-335.

[34]See Maricopa, etc. R. R. v. Arizona, 156 U. S. 347; S 15: 391; L 39: 447; (dealing with the situation of a Federal Indian Reservation within the outer boundaries of an Organized Territory).

existing local usages, local requirements, and local wishes; second, training and education for ultimate Statehood.

The operation of this policy, in the latter aspect of it, is seen in the extreme smoothness of transition of a Federal State to Statehood.[35]

Congress follows the same general policy in its general Legislation operative in Federal States.[36]

This policy is recognized and followed by the Judicial, as well as by the Legislative Branch of the General Government. The Federal Courts of general character yield to the local Judicial Precedents of a Federal State a deference closely corresponding to that yielded to State Judicial Precedent.[37]

§ 64. Presumption of Immunity of the United States.

Either in express terms, or, more commonly, by implication, Congress, in delegation of power to a Federal area, provides for Immunity of the United States (and of its instrumentalities, as such) from local action.[38]

§ 65. Confluence of Direct and Delegated Authority.

From what has been said it follows that there may be a confluence of Congressional and of Territorial action.[39]

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[35]§§ 82-88; 680.

[36]Thus, the exception of national banks from privilege of resort (as plaintiffs, or by Removal, as defendants) to (intra-State) Courts of the United States, by reason of their Federal creation, extends to national banks incorporated in a Federal area, as well as to those incorporated in a State. American Bank v. Tappan, 217 U. S. 600; S 30: 697; L 54: 897.

[37]§ 697.

[38]See Honolulu Transit Co. v. Wilder, 211 U. S. 137; S 29: 44; L 53: 121.

[39]As, where the validity of bonds of a County of a certain Territory rested in part upon Congressional, and in part upon Territorial, action. Schuerman v. Arizona, 184 U. S. 342; S 22: 406; L 46: 580.

So, where Congress establishes Courts within a Territory, for controversies arising under the Constitution and the general laws of the United States, with Judges appointed by the President, and provides for the creation by the Territory, of Territorial Courts, the Territory may (subject to reversal of its action by Congress) adopt, (as its Courts, Judges, and clerks of Court), such national Courts, Judges and clerks; and, in such cases, such Courts sit in two distinct capacities, —national and Territorial; and, while they sit in the former capacity, an attorney of the United States, and when they sit in the latter

§ 66. Tenure of Judicial Office.

The tenure-of-office text of the Judiciary Article of the Constitution does not apply to Courts of or in Federal areas, but the matter is left to the discretion of Congress.[40]

§ 67. Quasi-Sovereignty:—(a) in Exemption from Private Suit.

The self-governing Federal States are, in respect of Immunity from private suit, given, by Congress, the status of Sovereign political societies.[41]

§ 68. Quasi-Sovereignty:—(b) in Co-ordinateness, to Certain Intents, with the States of the Union.

In certain broad fields, and to certain broad intents, the Federal States, severally—self-governing and non-self-governing—are placed by Congress upon a footing of co-ordinateness with the States of the Union, and are, pro tanto, grouped, with the States of the Union, into a conventional Community of Nations, within the contemplation of the (Federally Adopted) general Law of Nations.[42]

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capacity, an attorney of the Territory, may be the proper prosecuting authority. Snow v. United States, 18 Wall. 317; L 21: 784.

[40]American Ins. Co. v. Canter, 1 Pet. 511; L 7: 242; McAllister v. United States, 141 U. S. 174; S 11: 949; L 35: 693; Reagan v. United States, 182 U. S. 419; S 21: 842; L 45: 1162. See Romeu v. Todd, 206 U. S. 358; S 27: 724; L 51: 1093.

[41]§ 609. [42]§§ 213-219.

CHAPTER XII.

INTRA-STATE CEDED PLACES:—RESERVED PLACES:—MEDIATIZED AREAS.[1]

§ 69. Declaratory Character of the Text Cited.

Specific textual provision was not essential to cession by States and acceptance by the United States. The power would have existed as matter of Federal Unwritten Organic law, without the text in question.[2]

The Cession clause, therefore, in its general aspect, and except in regard of certain particulars considered below, was merely declaratory of Federal Organic law already existing at the taking effect of the Constitution.

§ 70. The "Power * * * of Exclusive Legislation":—A Grant of Potential Plenary Sovereignty.

The power "to exercise exclusive legislation" is not limited, in interpretation, to legislation, but is construed to intend exclusive (Plenary) Federal Sovereignty, exercisable through the Legislative, the Executive, or the Judicial Branch. The expression "like authority" plainly carries the expression into general State cession.[3]

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[1]Const., Art. 1, § 8:—

The Congress shall have power

* * * * * * * * * * *

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;

[2]I. e., under the Treaty power between the United States and a State, existing prior to the Constitution, (and then exercised in the State cessions to the United States of Sovereignty over the Northwest Territory), and still continuing. See §§ 143-149.

[3]Western Un. Tel. Co. v. Chiles, 214 U. S. 274; S 29: 613; L 53: 994. In this case, a statute of Virginia provided, for failure to deliver a telegram, a pecuniary penalty, to be recovered by the addressee. A telegram addressed to a gunner on a war vessel lying in the Norfolk Navy Yard failed to be delivered. Held, that an action (brought in a

§ 71. Non-Limitative Particulars.

The mention in the text of the particulars "forts, magazines, dock-yards, and other needful buildings" does not limit the scope of the text (or at least does not limit the Federal power) to those particulars. For example, post-office sites are within the scope of the Federal power.[4]

§ 72. "Purchased by Consent" (of the State).

Taken literally, this language views the contemplated consent as directed to the acquisition (or to the acquisition and continuance) of title to the land; literally taken, too, it contains no idea of cession by the State. In a literal reading, therefore, it would mean that upon mere acquiescence (or at most, affirmative acquiescence) of a State in the acquisition or the continuance of holding by the United States of land within the State, the Federal Constitution shall operate to vest in the United States exclusive power of legislation over the land. This construction, however, would be an impracticable one. It would call upon every State, whenever the United States owned or acquired land within the State, to consent, or to withhold consent; and either (a) unwillingly to set up an objection (which, in fact, it did not entertain) to such an acquirement or holding, or (b) to lose its jurisdiction over the land; and it would force upon the United States jurisdiction which might be a mere burden to it.

The result of these considerations is: an interpretation discarding the literal reading, and substituting therefor the reading: "exclusive jurisdiction over places within a State owned (in greater or less title) by the United States, over which the State may cede its jurisdiction to the United States."

An illustration of the radical disconnection between (a) consent to the purchase, as purchase, and (b) cession, is presented in the situation where a State, being itself the owner in fee of land within its borders, sells and conveys it to the United States, by deed, for a money consideration, and with no mention of jurisdiction in the transaction. In such a transaction, the land is certainly (in the words of

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State Court of Virginia) for the penalty, would not lie, the State statute having no operation in the Navy Yard.

[4]Battle v. United States, 209 U. S. 36; S 28: 422; L 52: 670.

the Constitution) "purchased by consent" of the State; but such a transaction gives to the United States nothing but the title to the land as land.[5] It is, in such case, only upon independent subsequent cession that the Constitutional provision takes effect.[6]

The term "purchased" is here used in the technical sense in which it is employed in the Common Law of land title. From this view of the term, it follows: that it is immaterial how or when the title was acquired by the United States. The land may, for example, have been owned by the United States prior to the establishment of the State;[7] or the cession may precede the Federal acquirement of title.[8]

Title may be or may have been acquired either from a private individual, or from the State as owner.[9]

The title taken may be in fee; and, in that case, with full power of alienation in fee;[10] or by lease;[11] or, undoubtedly, in any other form.[12]

§ 73. "Purchased" as a Continuing Requirement.

The idea of Federal ownership involved in the term "purchased," gives to that term the requirement of continuance of Federal ownership; with the result that when, or in so far as, the Federal title ceases, the State cession of Sovereignty ceases to operate; as, when a military post is abandoned, and the land is sold.[13]

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[5]Hamburg-American Steamship Co. v. Grube, 196 U. S. 407; S 25: 352; L 49: 529.

[6]Ibid.

[7]Fort Leavenworth R. R. v. Lowe, 114 U. S. 525, 526; S 5: 995; L 29: 264; Ohio v. Thomas, 173 U. S. 276, 280; S 19: 453; L 43: 699.

[8]Fort Leavenworth R. R. v. Lowe; Ohio v. Thomas, both cited above; Palmer v. Barrett, 162 U. S. 399; S 16: 837; L 40: 1015; Benson v. United States, 146 U. S. 325; S 13: 60; L 36: 991; Hamburg-American Steamship Co. v. Grube, cited above.

[9]Western Un. Tel. Co. v. Chiles, 214 U. S. 274; S 29; 613; L 53: 994.

[10]See United States v. Jonas, 19 Wall. 598, 604; L 22: 177; United States v. Illinois Centr. R. R., 154 U. S. 225, 237; S 14: 1015; L 38: 971.

[11]Palmer v. Barrett, 162 U. S. 399; S 16: 837; L 40: 1015.

[12]§§ 116-120.

[13]United States v. Illinois Centr. R. R., 154 U. S. 225, 237; S 14: 1015: L 38: 971; Palmer v. Barrett, 162 U. S. 399; S 16: 837; L 40: 1015. See United States v. Jonas, 19 Wall. 597, 604; L 22: 177.

§ 74. Presumed Acceptance by the United States.

The matter of acceptance by the United States is governed by general principles. Thus, formal acceptance by Congress is not necessary, but acceptance may be presumed.[14]

§ 75. The Question of Potential Retrocession.

The Constitutional text now in question does not deal in terms with the question of power (a) of the United States to cede back (or, in the common expression, to "retrocede") area once State-ceded; or (b) power of a State to accept a retrocession. That matter, however, if not covered by implication from the text, would seem to be fully covered, by Federal Unwritten Organic law, favorably to the power.[15]

§ 76. The Question of Remaining Residence, in a State, of Some Degree of Sovereignty.

It is not unreasonable to view the Federal Sovereignty in a State-ceded area as being (in the absence of affirmative provision to the contrary), what we may call an easement, contingent upon occupation by the United States for the purpose for which the cession was made; with a corresponding remnant of Sovereignty in the ceding State. The question of such a legal situation takes on some degree of practical importance in view of the retrocession, in fact, of part of the original District of Columbia to Virginia. The view that the United States could have ceded that area to a State other than Virginia, has a certain harshness; and perhaps it is not unreasonable to assume, as existing in a ceding State, such remnant of remaining Sovereignty as has been suggested.

The doctrine seems to be assumed in Speer v. Colbert, 200 U. S. 130; S 26: 201; L 50: 403.

[14]Fort Leavenworth R. R. v. Lowe, 114 U. S. 525; S 5: 995; L 29: 264; Chicago, Rock Isl. & Pac. Ry. v. McGlinn, 114 U. S. 542; S 5: 1005; L 29: 270, Benson v. United States, 146 U. S. 325; S 13: 60; L 36: 991.

[15]As to a retrocession, in fact, to Virginia, of a part of the original District of Columbia, see § 78. See also Ohio v. Thomas, 173 U. S. 276, 280, 281; S 19: 453; L 43: 699.

§ 77. The "Consent of the Legislature."

In the case of cessions other than for the Seat of the Government, the Constitution seems to go beyond the principles of Unwritten Federal law, and to vest directly, in the State Legislature, as matter of Federal Organic law, power of cession. If this interpretation of the text be the true one, it would not be competent to a State, by its Constitution, to limit the power of its Legislature in this respect; but State legislatures are, pro hac vice, placed by the Constitution of the United States in the class[16] of a State officiel acting under Federal, not State, authority.[17]

§ 78. The Seat of the Government.

1. Pursuant to the Constitutional provision, cession was made, at an early period, by Maryland and by Virginia, respectively, of two tracts, aggregating in extent not exceeding ten miles square, opposite each other, on the Potomac River, and including so much of that river as was between the two tracts.[18]

The respective cessions operated to sever the ceded areas from the ceding States; to leave the combined ceded areas an extra-State Federal area, and to terminate the State domicil of the inhabitants of the ceded areas, and the State citizenship of such as were citizens of the ceding States;[19] and, as a necessary result, to domicil such persons in the Seat of Government; and, it would seem, to make them (with the exception of individuals not Constitutionally capable of Federal citizenship) citizens only of the United States; and to continue the same conditions of domicil and of citizenship for persons subsequently becoming inhabitants of the combined areas.[20]

Subsequently, Congress made retrocession (as it is usually designated) to Virginia, of the Virginia portion.[21]

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[16] § 150.

[17] It is under such Federal authority, e. g., that State Legislatures acted, prior to the Seventeenth Amendment, in the choice of Senators of the United States.

[18] For the history of the cessions, see Morris v. United States, 174 U. S. 196; S 19: 649; L 43: 946.

[19] Reily v. Lamar, 2 Cr. 344, 356; L 2: 300.

[20] In re Massachusetts, 197 U. S. 482; S 25; 512; L 49: 845.

[21] See § 75.

Under a general principle, considered elsewhere,[22] the pertinent local law of those States respectively would, in the absence of specific provision to that effect, have passed, and have continued, as an incident of the cession. The Acts of Congress, however, accepting the cessions, respectively, affirmed this principle.[23]

This legislation was, apparently, in that respect, merely declaratory.[24]

The Maryland portion, therefore, came with the Maryland law, and the Virginia portion with the Virginia law; and this diversity between the two portions continued.[25]

2. The District of Columbia has, in the past, been, but is not now, self-governing; but is governed directly by Congress and by the President, under Acts of Congress. In many respects, however, it has the features of a State;[26] and is, in general—subject to the qualifications above mentioned—on the footing of the self-governing Federal States; as, in actual (conventional) co-ordinateness, to certain broad intents, (a) with the Organized Federal areas, and (b) with the States of the Union.[27]

3. The District of Columbia has, however, the areal limits of a city of very considerable size, and the physical character, in many respects, of a large city; and government carried on for and within it, is analogous to city govern-

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[22]See § 45. [23]United States v. Simms, 1 Cr. 252, 256; L 2: 98; United States v. Eliason, 16 Pet. 291; L 10: 968.

[24]United States v. Simms, cited above.

[25]Ex parte Watkins, 7 Pet. 568; L 8: 786; Deneale v. Archer, 8 Pet. 526; L 8: 1032; Stelle v. Carroll, 12 Pet. 201; L 9: 1056; Rhodes v. Bell, 2 How. 397; L 11: 314; Kendall v. United States, 12 Pet. 524, 620; L 9: 1181; Van Ness v. Hyatt, 13 Pet. 294, 298; L 10: 168. Thus, a slave, bought in the Virginia portion of the District, and brought for sale into the Maryland part, thereupon became free, by operation of the law of Maryland, of continuing force. (Rhodes v. Bell, cited above). For an instance of Maryland Criminal law still, or recently, continuing in the District of Columbia, see Crawford v. United States, 212 U. S. 183; S 29: 260; L 53: 465.

So as to a Statute of Limitations. Metropolitan R. R. v. District of Columbia, 132 U. S. 1; S 10: 19; L 33: 231.

[26]E. g., a system of local Courts, rising from the plane of justices' Courts, to a Court of general jurisdiction; a General Term Appellate Court; and a Court of Appeals; as also its local statutory Consolidation; its system of Law Reports; and the like.

[27]§§ 213-219.

ment; and, in its municipal aspect, it is placed by Congress upon the plane of a municipal corporation,—its such status being represented in its liability, in respect of matters of municipal character, to private suit.[28]

4. Except in respect of certain fields of action of governmental machinery, the United States, as a political society, has no situs in the District of Columbia, but has situs throughout the Realm.[29]

§ 79. Intra-State Federally Reserved Places.

What has been said in the preceding sections, is applicable, mutatis mutandis, to the situation which arises when the United States establishes a new State out of Federal area, and reserves to itself Plenary Sovereignty over an area within the outer geographical limits of the new State.

The Constitution makes no specific textual provision in this respect. Congressional power of reservation, in such case, may be viewed as an Incident of the Congressional power of creating new States; but may be rested upon broader grounds,[30] or (in the case of an Indian Reservation) upon the Federal Paramount Sovereignty over Indian Tribes.[31]

§ 80. Mediatized Intra-State Areas.

It is competent to the United States: (a) to accept from a State a qualified cession; or (b), in creating a State, to make a qualified reservation of Federal Sovereignty. In such case, a given area in question is Federal area, within our use of the term; and the principles governing Federal

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[28]Metropolitan R. R. v. District of Columbia, 132 U. S. 1: S 10: 19; L 33: 231: (any language of broader apparent scope, in the Opinion, is to be read in light of the situation actually before the Court).

As to Immunity, in general, of a Federal State from such suit, see § 609.

[29]As, in respect of lex loci in the case of a contract to which the United States is a party. See Contracts of the United States, §§ 408, 409.

There is no municipal corporation entitled "Washington" or "The City of Washington" but these terms respectively are loosely employed in different senses, for local designation within the District of Columbia.

[30]See Treaty Between the United States and an Inchoate State, (§ 146).

[31]See that head. See Worcester v. Georgia, 6 Pet. 515; L 8: 483.

areas in general are applicable to it, subject to the qualification of the State cession or of the Federal reservation.[32]

Such qualified Federal areas are very numerous; and they differ widely, inter se, in extent and in particulars of the Federal Sovereignty. It will be sufficient to say, here, that what is said elsewhere, in general terms, of State area, of State area proper, and of Federal area, is applicable, distributively, to such qualified Federal areas, to the extent of Federal Sovereignty, and of State Sovereignty, respectively, therein.

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[32]Illustration:—

State cession qualified by State retention of power of taxation of certain classes of corporations and of their property physically within the ceded area. Fort Leavenworth R. R. v. Lowe, 114 U. S. 525; S 5: 995; L 29: 264; Chicago, Rock Isl. & Pac. Ry. v. McGlinn, 114 U. S. 542; S 5: 1005; L 29: 270. See Benson v. United States, 146 U. S. 325; S 13: 60; L 36: 991; Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292; S 35: 27; L 59: 234.

State cession qualified by State retention of power of service of Civil and Criminal process. Benson v. United States, cited above.

State cession qualified by State retention of general State legislative power to an extent not inconsistent with the desired Federal use and occupation. Chicago, Rock Isl. & Pac. Ry. v. McGlinn, cited above.

The potential elasticity of Federal and of State action in this field is illustrated in the case of a certain State cession, held construable as inclusive of a certain portion of certain Navy Yard premises, but (as a result of State reservation) held suspended, in operation, during the pendency of a certain lease (or license) from the United States and occupation thereunder, by the lessee (or licensee) for private purposes. Palmer v. Barrett, 162 U. S. 399; S 16: 837; L 40: 1015.

CHAPTER XIII.

FOREIGN POSSESSIONS.[1]

§ 81. The Subject Generally.

Area previously strictly Foreign, may be acquired and held by the United States, not as part and parcel of the United States, but as a mere dependency or "Foreign Possession" of the United States.

The domiciled inhabitants of such an area are not, as such, citizens of the United States;[2] and certain Judicial Procedure provisions of the Constitution and of Amendments I—VIII are not operative in such dependencies:[3] this principle extending to Treaty Courts held by the United States in countries strictly Foreign.[4]

On the other hand, such a Possession is not, in strictness, Foreign country, within the contemplation of the Federal Organic law.[5]

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[1]For matters not peculiar to Foreign Possessions, see preceding Chapters of the Present Part.

[2]Gonzales v. Williams, 192 U. S. 1, 11, et seq.; S 24: 171; L 48: 317.

[3]Dorr v. United States, 195 U. S. 138; S 24: 808; L 49: 128.

[4]In re Ross, 140 U. S. 453; S 11: 897; L 35: 581. (Consular Court).

[5]The Constitutional provision: "No tax or duty shall be laid on articles exported from any State", does not apply to exportation to a Foreign Possession. Dooley v. United States, 183 U. S. 151; S 22: 62; L 43: 128.

Reference may be made to certain Congressional legislation as follows:

Alien-exclusion legislation presumptively does not extend to such domiciled inhabitants of a Foreign Possession as are not citizens of a Foreign country. Gonzales v. Williams, 192 U. S. 1; S 24; 171; L 48; 317.

The so-called "Philippine Bill of Rights" is interpreted like corresponding text of the Constitution. Serra v. Mortiga, 204 U. S. 470; S 27: 343, L 51: 571; Kepner v. United States, 195 U. S. 100; S 24: 797; L 49: 114; Carino v. Insular Government, 212 U. S. 449; S 29: 334; L 53: 594; Gavieres v. United States, 220 U. S. 338; S 31: 421; L 55: 489; Dowdell v. United States, 221 U. S. 325, 330-331; S 31: 590; L 55: 753; Diaz v. United States, 223 U. S. 442; S 32: 250; L 56: 500.

Ocean voyages between the United States proper and a Foreign Possession, as coastwise trade, within an Act of Congress: Huus v. New York, etc. S. S. Co., 182 U. S. 392; S 21: 827; L 45: 1146.

Foreign Possession as not a Foreign country, within the meaning of certain tariff legislation: DeLima v. Bidwell, 182 U. S. 1; S 21: 743; L 45: 1041. As to Downes v. Bidwell, 182 U. S. 244; S 21: 770; L 45: 1088, see § 359, par. 2.

CHAPTER XIV.

Transition to Statehood: Substantive Law.

§ 82. The Question Generally.[1]

1. Upon the establishment of Statehood in and from any portion of Federal area, the Federal Organic law operates directly: (a) to repeal or to modify such law existing immediately prior to Statehood, as is not consistent with Statehood; (b) to introduce new Federal law common to the States as such.

2. Particulars of transition to Statehood are an Incident of creation of Statehood, and are, as such—and from the nature of the case—within the power of Congress.[2]

3. Prospective establishment of Statehood does not operate to limit the scope of the Federal Plenary Sovereignty over a given Federal area; but Congress may bind such area by provisions of permanent character. In such case, Statehood, when subsequently established, comes into existence, pro tanto, cum onere.

Thus, a reservation to Tribal Indians, in a Treaty between an Indian Tribe and the United States, of fishing-rights in a river in a Federal area (if contemplated by the Treaty as permanent) holds as against the State authority, upon and after the establishment of Statehood in the area.[3]

So, Congress subjected Oregon, during the Territorial period, to concurrent jurisdiction of the then Territory of Washington, over offences committed on the Columbia River, (the boundary between the two Territories); and, subsequently, in the Act admitting Oregon as a State (Washington still being a Territory) effectually provided for the continuance of the same conditions.[4]

4. Transition to Statehood operates, proprio vigore, to repeal, quoad hoc, as to the area in question, Acts of Con-

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[1]See also § 680 (as to Judicial Procedure).

[2]See later sections.

[3]Winters v. United States, 207 U. S. 564; S 28: 207; L 52: 340.

[4]Neilson v. Oregon, 212 U. S. 315; S 29: 383; L 53: 528. See also, American Ins. Co. v. Canter, 1 Pet. 511; L 7: 242; United States v. Winans, 198 U. S. 371; S 25: 662; L 49: 1089.

gress resting, as to the area, upon its character of Federal area, and not within the scope of intra-State Federal competency: as, an Act fixing, for the Federal area, local railroad rates.[5]

§ 83. Particulars of Conversion of Local Federal Law Into State Law.

We have spoken elsewhere,[6] of the existence, in the Federal areas, severally, (a) of general, (b) of local, Federal law,—the line of demarcation following quite closely the line of division, in State area, between State-sanction law and Federal law of intra-State operation. Upon establishment of Statehood (and in the stages of Transition) the substitution of a new and a different line of division becomes requisite—namely, the line between (a) State law (of State sanction) and (b) Federal law operative in the State. Since there is no change in the inhabitancy, at such period of transition; and since the local law of the pre-Statehood period represents, in general, the wishes of the inhabitants, there is, in practice, no material change of law, but only such new line of demarcation and of character. That is to say, in practice, the aggregate body of law prevailing prior to Statehood, usually continues on, in the main, but with a division, now, into Federal, and State, law.

To a certain extent it is competent to Congress, by way of incident to the establishment of Statehood, to deal with the matter of such new division; and, to a certain extent, Congress does deal with it. In great measure, however, the new division of law is tacitly effected by the operation of Common law principles of adjustment.

Speaking broadly, we may say: that so much of the existing law as is of purely local operation (whether it be of local or of general Federal character) becomes local State law; while so much as is of general operation (a) disappears (as in the case of local law of Admiralty and Maritime character); or (b) (as in the case of the national bank or Bankruptcy legislation), continues on, unchanged in sub-

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[5]Oklahoma v. Atchison, T. & S. F. Ry., 220 U. S. 277; S 31: 434; L 55: 465; Oklahoma v. Chicago, Rock Isl. & Pac. Ry., 220 U. S. 302; S 31: 442; L 55: 474.

[6]§§ 41-53.

stance, but resting, now, not upon the Plenary (extra-State) Federal Sovereignty, but upon the intra-State Federal Sovereignty.

Since a municipal corporation of a Territory, and bonds issued by such a corporation, are governmental instrumentalities of the United States, outstanding such bonds retain their such character, upon transition of the Territory to Statehood, and are within the principle of Federal Immunity from State action.[7]

The power of Congress extends to all necessary adjustments. Thus, Congress may, in a Statehood Act, provide for the transfer from the local Federal Courts, to State Courts of the new State, of such pending causes as would naturally go to State Courts; and of other pending causes to Courts of the United States to be established in the new State; and this in respect not only of Civil but of Criminal causes,[8] remitting to the State Courts, pending or potential prosecutions for past violation of local law of the Federal area; and to the Courts of the United States such prosecutions for past violation of general Federal law.[9]

In a variety of ways, such power of Congress is defined and limited by Federal Organic law. The operation of such Organic law in this field is illustrated in the matter of Criminal Procedure.[10]

§ 84. The Same Subject:—The Case of Silence of Congress.

In (or to the extent of) absence of specific dealing by Congress with the matter, there comes into operation a general principle of Unwritten general Federal law: namely, the principle of presumptive continuance of local law, upon change of Sovereignty; and such local law, in so far as pertinent to new conditions, continues in force.

Thus, local franchises, whether of direct Congressional, or of local grant, remain in force.[11]

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[7]Farmers' Bank v. Minnesota, 232 U. S. 516; S 34:354; L 58:706. As to the general principle of such Federal Immunity, see §§ 125-234.

[8]Pickett v. United States, 216 U. S. 456; S 30: 265; L 54: 566.

[9]§ 680. [10]Ibid.

[11]Trustees of Vincennes University v. Indiana, 14 How. 268; L 14: 416; Rogers v. Burlington, 3 Wall. 654; L 18: 79; Kansas Pac. R.

So, of mining appropriations of water.[12]

§ 85. Interpretation of Enabling Acts.

Enabling Acts are construed with a presumption in favor of State power. Thus, an Enabling Act provided for the disposal of certain public land by the State Legislature. The provision was interpreted as intending: not to make the State Legislature a Federal instrumentality pro hac vice, (and thereby independent of control in the matter by Organic law of the State), but to leave it as a State instrumentality.[13]

§ 86. Principal and Incident.

In the field now in question, as elsewhere, the Doctrine of Incident, in the Federal conception of it, operates broadly; and where a principal thing (a) passes, or (b) does not pass, to the State, its Incidents pass, or fail to pass, accordingly, in the absence of affirmative provision to the contrary. Thus, if a patent of land, in a Federal area, is void, in law, and public lands generally are not affirmatively reserved to the United States, the defect in the patent enures to the benefit of the State, and not of the United States.[14]

§ 87. Presumption of Transfer of Sovereignty up to the Limit of State Capacity.

In absence of affirmative provision there is a presumption in the establishment of Statehood, in or from Federal area, of transfer from the United States to the new State, of the whole Sovereignty, up to the capacity of a State in respect of Sovereignty. The presumption applies, for example, to the matter of Sovereignty over the bed of a stream; over other submerged land; and over littorals, as such,—where Federal areal Sovereignty might have been reserved.[15]

R. v. Atchison, T. & S. F., 112 U. S. 414; S 5: 208; L 28: 794; See Oklahoma v. Atchison, T. & S. F. Ry., 220 U. S. 277; S 31: 434; L 55: 465.

[12]Bean v. Morris, 221 U. S. 485; S 31:703; L 55:821.

[13]Haire v. Rice, 204 U. S. 291; S 27:281; L 51:490.

[14]United States v. Chandler-Dunbar Co., 209 U. S. 447; S 28:579; L 52:881.

[15]United States v. Chandler-Dunbar Co., cited above.

§ 88. Presumption of Transfer of Title to Public Lands.

Presumptively, in the absence of affirmative provision, unoccupied land of the United States, in a Federal area, passes to the State, upon Statehood.[16] The presumed grant is defined, in the absence of specific definition by Congress, by pertinent general principles of the Common Law: (as the Common Law doctrine that a grant of land bordering upon a stream, navigable or non-navigable, goes to the thread of the stream, and includes islands, or at least such as are small and insignificant).[17]

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[16]United States v. Chandler-Dunbar Co., cited above.

[17]United States v. Chandler-Dunbar Co., cited above; Moss v. Ramey, 239 U. S. 538; S 36:183; L 60:425.

PART III.

THE FEDERAL SOVEREIGNTY IN, AND IN RESPECT OF, STATE AREA PROPER.[1]

[1]As to the relative order of the Parts of Book II, see Table of Contents, Book II, ad init., note.

CHAPTER XV.

FEDERAL LAW AS LAW OF THE LAND, IN A STATE[1]:—FEDERAL LAW AS STATE LAW.

§ 89. Fusion of Federal Law and State Law:—Federal Amendment of State Law.[2]

From the character of all Federal law, as Law of the Land, in State area, it follows: that where the Federal law deals with one portion of some particular field of action, and a State deals (consistently with the Federal law) with another portion of that field, the Federal law of the subject, and the State law of the subject, fuse together, and form, pro tanto, a single, homogeneous Law of the Land; any unassimilable feature of State law being nullified.[3]

Where Federal law is nullificatory of a (colorable) State Amendment of State law (Organic or non-Organic), it

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[1]Const., Art. VI:—

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

As to Treaty as Law of the Land, see that head, (§§ 314 et seq.).

[2]The term "State Law" is here used broadly to include Organic or non-Organic law, of any class.

[3]Thus, where a State law, validly requiring, in general, an occupation license, contained a particular requirement inconsistent with Federal law; and an applicant was refused a license for refusing to comply with such particular requirement; it was held that he was not remitted to a Judicial remedy for obtaining a license, but was entitled to proceed with the occupation without a license. Royall v. Virginia, 116 U. S. 572; S 6:510; L 29:735; Royall v. Virginia, 121 U. S. 102; S 7:826; L. 30:883.

So of a State jury statute, valid in general, but invalid in such part of it as undertook to exclude from jury service persons of color, as such. Neal v. Delaware, 103 U. S. 370; L 26:567; Bush v. Kentucky, 107 U. S. 110; S 1:625; L 27:354.

So of mere modification, by operation of Federal law, of State railroad-rates law, (Houston etc. Ry. v. United States, 234 U. S. 342), S 34:833; L 58:1341; and (in favor of Indians) of State Probate law. Truskett v. Closser, 236 U. S. 223; S 35:385; L 59:549. So,

operates to leave the pre-existing State law (Organic or non-Organic) in force, unamended.[4]

Federal law may operate indirectly to broaden the scope or operation of State law.[5]

The principles above considered apply to Unwritten, as to Written State law. Thus, in a certain class of action in tort, for personal injuries, contributory negligence of the person injured was, by State law, (under which alone a cause of action existed), a defence. Congress (having jurisdiction over that class of cases) left this general principle of the State law untouched; but altered the definition of contributory negligence. This was, in effect, a Federal Amendment of the State law; and the State law and the Federal law fused into a single body of law.[6]

When State Written law (Organic or non-Organic), is in general, consistent with Federal law, but contains a qualification inconsistent with Federal law, the Common Law principle of rejection of a void qualification (where such qualification is, upon Common Law principles separable), is operative, and the State law enactment takes effect, in general, but diminished by Federal law.[7]

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riding, free, on an interstate train journey, in violation of Congressional legislation, enters into, and qualifies the law of tort, of a State, and may defeat right (otherwise existing, under State law) of recovery of damages for personal injury. Illinois Centr. R. R. v. Messina, 240 U. S. 395; S 36:368; L 60:709.

[4]Seibert v. Lewis, 122 U. S. 284; S 7:1190; L 30:1161; Eberle v. Michigan, 232 U. S. 700; S 34:464; L 58:803.

[5]Wabash R. R. v. Pearce, 192 U. S. 179; S 24:231; L 48:397 (Federal Revenue Act operative indirectly to give a lien, under State law, to a carrier paying duty).

[6]Schlemmer v. Buffalo etc. Ry., 205 U. S. 1; S 27:407; L 51:681.

[7]Thus, a State enactment, providing for admission of foreign corporations, but providing that they shall not be subject, in the State, to a suit in a Court of the United States, if valid for admission, is invalid as to the limitations—the limitation being void as against Federal policy, and thereby repugnant to the grant. Barrow S. S. Co. v. Kane, 170 U. S. 100; S 18:526; L 42:964. (See § 663).

So, of a separable void requirement, in a State occupation-tax Act otherwise valid. Royall v. Virginia, 116 U. S. 572; Royall v. Virginia, 121 U. S. 102, both cited above.

§ 90. No Judicial Procedure Necessary.

Direct operation of Federal law, upon persons and things, is illustrated in the principle that one may ignore, in pais, colorable State law, and colorable State action thereunder, and may act in pais, accordingly.[8]

§ 91. Higher and Lower Planes of State Law, Actual or Colorable.

From the standpoint of Federal law as Law of the Land, there is no generic difference as among different planes of State law, actual or colorable; but a State Constitution, or an Amendment thereto, is subject, like mere State legislation (of higher or of lower plane) to the operation, above considered, of Federal law as Law of the Land within the State.[9]

§ 92. Federal Law as State Law.

By reason of principles above stated, Federal law, operative within a State, has been characterized as being: not merely (a) law within the State, but (b) law of the State.[10]

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[8]Royall v. Virginia, 116 U. S. 572; S 6:510; L 29:735 (in which a State official, under color of Federally invalid State law, refused an occupation-tax license, and the applicant was thereupon entitled to proceed without a license).

[9]Dodge v. Woolsey, 18 How. 331; L 15:401; Gunn v. Barry, 15 Wall. 610; L 21:212; many later cases.

[10]"It must always be borne in mind that the Constitution of the United States 'and the laws which shall be made in pursuance thereof' are 'the supreme law of the land' (Const., Art. VI) and that this law is as much a part of the law of each State, and as binding upon its authorities and people, as its own local Constitution and laws." Farmers' Bank v. Dearing, 91 U. S. 29, 35; L 23:196.

CHAPTER XVI.

POWERS:—GENERAL VIEW:—LATENCY:—FEDERAL INACTION.

§ 93. "Powers" as a Unity.

The Federal intra-State Sovereignty—as it has existed at the various stages of its development, prior to, and under, the Constitution, and as it now exists—has had, and has no precise counterpart; but, in its particulars, has been, and is, unique in the field of Sovereignty. As a result, there exists, in general political thought, no distinct and precise conception of it, as a whole; and no single term is precisely or closely descriptive of it; and we therefore view it, and speak of it, as a collection of "powers." It is, however, to be borne in mind, that Sovereignty,—complete or qualified—existing in any political society, is a unit, however imperfect may be our conception of it and our power of summary expression of it in speech; and that the aggregate of intra-State Federal powers constitutes, in reality, a unit.[1]

§ 94. The Particular Textual Provisions:—General View.

For a proper general view of the particular textual provisions of the Constitution, in respect of powers, we may view them from a historical standpoint. Thus, the specific provision of Congressional power of Criminal legislation against counterfeiting,[2] represents merely the ease and the wide extent of counterfeiting the notes issued by the Continental Congress, and the consequent concentration of Federal attention, in 1787-9, upon that form, and upon two or three other particular forms, of Crime; and is, as matter of law, of no specific operativeness: as is shown by the great actual breadth of Congressional Criminal legislation in other fields.

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[1]Legal Tender Cases, 12 Wall. 457, 532, 533; L 20:287.

[2]Art. I, § 8:—

To provide for the punishment of counterfeiting the securities and current coin of the United States.

So, the provision in respect of Military law,[3] adds nothing, in legal effect, to the more general War, Army and Navy texts: as is shown by the broad development (above referred to) under those general texts, of the Military Pension power, and its Incidents.

We cannot, therefore, view the powers specifically and textually allotted, as all of one grade, and as so many distinct and separate sources of power; nor can we view each and every one of them as generically different from, and as superior in grade to, powers not textually specified.

§ 95. "Enumerated" Powers.

The Federal intra-State Sovereignty is sometimes characterized as one of "enumerated" powers. The expression originated at an early period, when the view was widely asserted that Federal powers were quite closely limited to the specific text of the Constitution. The expression has, however, long been, and now is, employed in a conventional sense, and does not intend powers textually and explicitly particularized in the Constitution.[4]

Indeed, the general textual provision of the Constitution, in respect of powers,[5] specifically excludes the theory of detailed textual enumeration.[6]

§ 96. The Numerical Aspect of Powers.

Over a considerable early period, the "powers" would probably have been said, by most persons, to be of a very limited number, readily specified (according to one's point of view), and capable of being counted, numerically. Gradual authoritative recognition, however, of powers in the several fields—Legislative, Executive, and Judicial—has

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[3]Art. I, § 8:—

To make rules for the government and regulation of the land and naval forces.

[4]Legal Tender Cases, 12 Wall. 457, 533; L 20:287: "non-enumerated powers", et seq.

[5]Const. Art. I, § 8:—

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any Department or officer thereof.

[6]As to impracticability of detailed enumeration of powers, see McCulloch v. Maryland, 4 Wh. 316, 405, et seq.; L 4:579; Legal Tender Cases, ubi supra.

gone to such an extent that the conception of possible numerical "enumeration" of powers is tenable by no school of political thought.

§ 97. "Powers" as Incidents of Other "Powers".

A vast number of powers, now recognized as existing, exist—or are commonly viewed as existing—by way of Incident to other powers.

For the propagation of Incident, an Incident-power may itself be a principal. Thus, the textually specified War power, yields, as successive Incidents, in successive stages: the military-pension power; power of protection of pensioners, as such, and of pension-money, as such; power of following pension-money through changes of form; power of conversion, pro tanto, of State guardianship status into Federal guardianship status, with individual Federal duty and liability; and with power of Federal Criminal punishment for violation of such status.[7]

§ 98. The Power of Definition and Delimitation of the Federal Sovereignty.

Upon any question as to existence or of definition or delimitation of Federal powers, power of authoritative determination rests, of necessity, with the Federal authority.

§ 99. The Element of Degree.

The question of existence or of definition of Federal power, in a particular field or under particular circumstances, is often matter of mere degree.

That is to say, in a given situation there may exist an element generically such as to be, or to afford, a basis of Federal Sovereignty; but such element may be so slight as to be offset by other features of the situation, and may, thereby, be inoperative.[8]

§ 100. Federal Inaction:—Latency.

It has sometimes been contended that continued Federal inaction, over a considerable period, in a field of potential

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[7]United States v. Hall, 98 U. S. 343; L 25:180. As to limits of Congressional power in this field, see McIntosh v. Aubrey, 185 U. S. 122; S 22:561; L 46:834.

[8]As in Keller v. United States, 213 U. S. 138; S 29:470; L 53:737. Illustrations of the principle abound in a great number of fields. See, in particular, Immunity of the United States; Commerce; Quarantine; Inspection.

Federal Sovereignty, amounts to a waiver of it in favor of State or individual action (or of a combination of the two), taken during such period, involving material and non-revocable changes: as, in the building of an important bridge, under State sanction, over a navigable river. This contention amounts to a contention that the legal or Equitable doctrines of Laches and Estoppel run, by Unwritten Federal Organic law, against the United States, in the field of potential Sovereignty. No such principle, however, exists. All State action, and all individual action, had during a period of such Federal inaction, are subject to Federal exercise, at any time, of the potential Federal Sovereignty.[9]

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[9]Gibbons v. Ogden, 9 Wh. 1; L 6:23; Bridge Co. v. United States, 105 U. S. 470; S 10:1071; L 34:551; Union Bridge Co. v. United States, 204 U. S. 364; S 27:367; L 51:523; United States v. Delaware & Hudson Co., 213 U. S. 366; S 29:527; L 53:836; Monongahela Bridge v. United States, 216 U. S. 177; S 30:356; L 54:435; Hannibal Bridge Co. v. United States, 221 U. S. 194; S 31:603; L 55:699; Grand Trunk Ry. v. Indiana R. R. Comm., 221 U. S. 400; S 31:537; L 55:786; Philadelphia Co. v. Stimson, 223 U. S. 605, 634, 636, 637; S 32:340; L 56:570; Greenleaf Lumber Co. v. Garrison, 237 U. S. 251; S 35:551; L 59:939.

CHAPTER XVII.

Federal Powers as Accruing from State Action.

§ 101. The General Principle.

From the standpoint of Federal Sovereignty, there is no generic distinction between (a) property, title, status, or privilege existing by nature, or otherwise, apart from State action, and (b) such matter created by a State. When, therefore, such latter matter comes into existence, Sovereignty over it accrues to the United States as over other matter. In the field of Commerce, the principle is of broad application, as, in respect of ordinary highways laid out or built under State authority, and of railroads.

It is illustrated in the Congressional power of constituting State highways as post-roads, and of dealing broadly with them, as such; and, in particular, of granting rights, in such highways, to telegraph corporations, subject to reasonable particulars of State regulation;[1] in the Federal Bankruptcy dealings with State-created corporations; in Federal taxation of such corporations; and in Federal creation of Criminal liability of such corporations, and in a great variety of other fields.[2]

§ 102. Application to State-granted Immunities.

The principle in question is operative not merely upon State-granted property or status (as, franchises) but also, mutatis mutandis, to State-created qualifications, exceptions, or immunities. That is to say; qualification, exception, or immunity, if granted at all, by a State, falls within the Federal protection and within general Federal principles.

Thus, a certain State having exempted from taxation products of the soil of the State, in the hands of an immediate vendee from the grower, the exemption accrued, by operation of Federal law, to one who had, in another State, bought, immediately from the grower, products of

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[1]Essex v. New England Telegr. Co., 239 U. S. 313; S 36:102; L 60:301.

[2]See under particular heads.

the soil of the latter State, and had brought them into the taxing State in the course of intercommerce.[3]

[3]Darnell & Son v. Memphis, 208 U. S. 113; S 28:247; L 52:413: (rested as to nullity of the discrimination, upon the Commerce clause; but requiring, it would seem, for its affirmative extension of the exemption to the plaintiff in Error, the proposition of our text: since mere conflict of the State exemption clause with the Commerce clause would have nullified the exemption clause in toto, as to all products, and have left the plaintiff in Error taxable under the general State tax provisions).

CHAPTER XVIII.

Federal Intra-State Power Based Upon Individual Status.

§ 103. The General Principle.

Where, and in so far as, an individual possesses Federal character, or status, he is a subject of actual or of potential Federal protection and control.

Specific applications of the principle are considered in succeeding sections.

§ 104. Status of Federal Citizenship.

The question of Federal protection of the status of a citizen of the United States, as such citizen, is considered under various specific heads.[1]

§ 105. Federal Officials, as Such.

In respect of Federal Intra-State power based upon Federal official character, we need only refer, for illustration, to the Federal Judicial power of self-protection, and of protection of Executive officers acting in protection of Federal Judges,[2] and to Congressional power of punishing interference with Federal supervisory Election officers, in State elections of Federal concern.[3]

§ 106. Federal Wardship.

Persons under Federal wardship of any class, have, pro tanto, Federal status, and are within the scope of Congressional power, for protection: as, in the case of aliens vested, by a Treaty, with property rights within a State;[4] of persons under Federal imprisonment or detention;[5] and

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[1]See Federal Citizenship (§§ 301-303); Equal Protection of the Laws (§§ 497-499). See, also, under specific heads, as, Voter; Juror.

[2]In re Neagle, 135 U. S. 1; S 10: 658; L 34: 55: (delivery, by Federal habeas corpus, of a United States Marshal from prosecution in a State Court, for justifiable homicide committed in the course of protection of a Federal Judge).

[3]Ex parte Siebold, 100 U. S. 371; L 25: 717. See also, § 730 (Removal of suits against Federal officials).

[4]Hauenstein v. Lynham, 100 U. S. 483; L 25: 628.

[5]Logan v. United States, 144 U. S. 263; S 12: 617; L 36: 429; United States v. Shipp, 214 U. S. 386; S 29: 637; L 53: 1041; 215 U. S. 580; S 30: 397; L 54: 337.

of private individuals giving information to prosecuting law officers of the United States.[8]

§ 107. Status as Voter.

While a citizen of the United States, being a citizen of a particular State, has not, merely by his Federal citizenship, a right to be included within the voter class of the State,[7] nevertheless, if within the State voter class, he is Federally protected in respect of his vote, in a field of Federal concern, as against not only State, but individual, obstructive action.[8]

§ 108. Aliens.

The status of alienage is within Federal protection and control.

Thus, an alien whom the United States permits to enter and to remain within the United States proper[9] has, unless restricted by Federal law, a corresponding right in respect of any State; and, being within a State, is a subject of Federal protection as against State action adverse to such aliens as such.[10]

The intra-State power of Congress,[11] over and in respect of aliens, is limited, at various points, by the line of delimitation, (as Judicially ascertained), in one or in another field, between Federal, and State, Sovereignty, in State area proper.

Thus,—while Congress may provide for deportation of an alien within a period as long as three years from the date of entrance to the country, the general conduct of an alien in a State, during such period, is, as far as Congressional action is concerned, matter of State, not of Federal control.[12]

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[6]In re Quarles & Butler, 158 U. S. 532; S 15:959; L 39:1080.

[7]§§301-303.

[8]Ex parte Siebold, 100 U. S. 371; L 25:717; Ex parte Yarborough, 110 U. S. 651; S 4:152; L 28:274; United States v. Mosley, 238 U. S. 383; S 35:904; L 59:1355.

[9]"Proper": i. e., exclusive of Foreign Possessions of the United States.

[10]Truax v. Raich, 239 U. S. 33; S 36:7; L 60:131. See, also, under the general head Aliens (§§ 304, 305).

[11]But not necessarily Federal power in general, as, Federal Treaty power.

[12]Thus, Congress cannot punish the harboring within State area proper, within such period, of an alien, for the pursuit of an occupa-

§ 109. Race or Color.

Mere race or color of individuals is not matter of Federal status, and in and of itself involves no Federal intra-State power.

This principle is illustrated in the fields (1) of public State action and (2) of private intra-State action, respectively as follows:—

(1) In the Field of Public (State) Action.—Members of the African race, being citizens of the United States and of a State, are not, as a class, entitled, as matter of Federal law, to the voting franchise within the State, even for elections of Federal concern;[13] nor are they entitled to be drawn upon for jury duty in the State Courts;[14] and the States severally have power of classification of such persons, in such fields of private character as are otherwise within State power: as, in classification of passengers in intrastate transit, by race or color.[15]

(2) In the Field of Private Intra-State Action.—It is not within the power of Congress to punish purely private acts of violence, within a State, merely on the ground that they are directed against persons of the African race, as such;[16] or to forbid classification, by common carriers, of passengers, in intrastate transit, by race or color.[17]

§ 110. Incidental Status.

An individual possessing no Federal status of his own, may have such status by way of Incident to Federal status of another individual: as, formerly, in the case of a slave owned by an alien under the laws of the alien's domicil.[18]

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tion wrongful per se, and Criminal by the law of the State. Keller v. United States, 213 U. S. 138; S 29:470; L 53:737 (three Justices dissenting).

[13]§§ 101-103. [14]§§ 497-499.

As to suprastate transit, see § 182.

[15]§§ last cited.

[16]United States v. Cruikshank, 92 U. S. 542; L 23:588; Hodges v. United States, 203 U. S. 1; S 27:6; L 51:65.

[17]Civil Rights Cases, 109 U. S. 3; S 3:18; L 27:835.

As to suprastate transit, see § 182.

[18]The Antelope, 10 Wh. 66; L 6:268 (a case, in one aspect of it, of Federal Judicial restoration of slaves to nonresident alien owners).

CHAPTER XIX.

Federal Property as a Basis of Federal Intra-State Sovereignty.

§ 111. The General Doctrine.

Where, or to the extent that, the United States has title in, possession of, or direct concern with, a res, real or chattel, it has, as an incident thereof, Sovereignty to the extent of action necessary and convenient for the maintenance and protection, and for the furtherance, of its such interests.[1]

§ 112. Distinction between, and Confluence of, (a) Property Right, as Such, and (b) Sovereignty Based upon Property.

In respect of such intra-State Federal property, the United States holds two distinct positions: (a) that of property owner, as such, on the footing of property owners in general; (b) that of a dominant Sovereign, with right, as such, of control and protection of its property.[2]

Acting from the standpoint merely of the former of these positions, the United States may, like any other owner, invoke, and avail itself of, the provisions of State law: as, in the prevention of trespass; the removal of fences or other physical structures, violative of State law;[3] or in suit in trespass[4] or for Injunction.[5]

Acting, on the other hand, (partly or exclusively) from the standpoint of the second position, (that of dominant Sovereign), the United States may itself legislate in respect of its intra-State property: as, for example, in the way of regulation of fencing.[6]

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[1]Camfield v. United States, 167 U. S. 518; S 17:864; L 42:260; other cases, generally, cited in this Chapter.

[2]Camfield v. United States, 167 U. S. 518, 524; S 17:864; L 42:260; * * * "the Government has, with respect to" * * *

[3]Camfield v. United States, cited above.

[4]Cotton v. United States, 11 How. 229; L 13:675.

[5]Light v. United States, 220 U. S. 523; S 31:485; L 55:570.

[6]Camfield v. United States, cited above; United States v. Grimaud, 220 U. S. 506; S 31:480; L 55:563; Light v. United States, cited above.

The two positions above distinguished, are, of course, capable of confluence. That is to say, in respect of its such property, the United States may stand in part, or to a certain extent, upon its rights as an ordinary proprietor; and, in part, or to a certain extent, upon its power as dominant Sovereign.[7]

§ 113. Transition from Federal Title.

When (as in the ordinary case of public land-grant to individuals), intra-State property once owned by the United States has passed completely out of Federal title, and is no longer of Federal concern, it ceases, as property, to be a basis of Federal Sovereignty. It is then, for example, subject to State law of Laches or Estoppel.[8]

§ 114. State Action in Furtherance of Federal Title.

In the field now in question, as in other fields, a State may act in furtherance of Federal title.[9]

§ 115. Real or Chattel Property.

Our illustrations stated above have been drawn from real property. There is, however, of course, no distinction in principle between real and chattel estate; and what is said of real property is applicable, mutatis mutandis, to Federal chattel property, lying or existing within the limits of a State: as, public vessels; munitions of war; and the chattel implements of the postal and other services.[10]

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[7]Cases cited above.

[8]Moran v. Horsky, 178 U. S. 205; S 20:856; L 44:1038; Pittsburgh Iron Co. v. Cleveland Iron Min'g Co., 178 U. S. 270; S 20:931; L 44:1065. See § 684, ¶ 5.

[9]As, in ejecting mere intruders, from land of the United States. Marshall Dental Co. v. Iowa, 226 U. S. 460; S 33:168; L 57:300.

[10]As to Federal Contract, from the standpoint of Federal intra-State Sovereignty, see Contracts of the United States, (§§ 408, 409).

CHAPTER XX.

FEDERAL POWER OF PURCHASE AND HOLDING OF LAND OR OTHER PROPERTY IN A STATE:—POWER OF DISPOSAL.[1]

§ 116. Land:—The General Principle.

By way of Incident to more specific powers, the United States may, in the discretion of Congress, purchase and hold within a State, land, or any interest or estate in land.[2]

§ 117. Illustration of Common Law Character of the Power.

Illustration of the Common Law character of the power may be seen in various applications to it of Common Law principles, as follows:—

The United States, if it sets up title to a certain tract of land, may, by compromise, accept part of the tract and yield its claim to the remainder; and, in such case, all the pertinent rules of general law are operative, as: the rule that the compromise is final, and that the validity of the title taken is not destroyed by the absence of valid title of the United States to any part.[3]

The United States, upon laying a direct tax upon land within a State, may sell for taxes, and may buy in the land, at the tax sale,[4] and with the same effect as in the case of a purchase by the United States for an actual specified Federal use, as, for a fort. Land so acquired is, for example, exempt, in the ownership of the United States, from State taxation.[5]

The United States may, to secure a debt due to it, take a mortgage of land within a State.[6]

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[1]In this Chapter, the terms "land" and "purchase" are employed in the technical Common Law sense.

[2]See below.

[3]St. Louis v. United States, 92 U. S. 462; L 23:731.

[4]De Treville v. Smalls, 98 U. S. 517; L 25:174; United States v. Lawton, 110 U. S. 146; S 3:545; L 28:100; Van Brocklin v. Tennessee, 117 U. S. 151; S 6:670; L 29:845.

[5]Case last above cited; §§ 125-134.

[6]Neilson v. Lagow, 12 How. 98; L 13:909; Van Brocklin v. Tennessee, cited above.

If land purchased by the United States is, at the time, subject to a mortgage, the United States takes cum onere, on the footing of a private purchaser, and with the same (but with no greater) right of redemption, in matter of Substantive right.[7]

The United States may acquire a special property, by the imposition of a lien. In providing for Federal liens, Congress is free to order the particulars as it will; and all persons are bound to know the Federal provisions, and the facts which may bring or may have brought such provisions into operation. Thus, a Revenue lien, even without physical seizure, and with no publicity, takes precedence of an incumbrance arising, under State law, after the inception of the lien.[8]

The United States is free to take land within a State, under Eminent Domain.[9]

§ 118. State Co-operation.

A State may co-operate with the United States, in the Federal acquisition (or retention), or the Federal holding, of land in State area: as, by general Eminent Domain machinery and Procedure, available to the United States,[10] or by a specific taking, at the request of, and for the benefit of the United States.[11]

§ 119. Federal Potential Independence of State Requirements:—Federal Voluntary Yielding.

1. Federal independence of State law, in the general field in question, is illustrated in Federal freedom from the operation of a State requirement of registration of liens.[12]

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[7]United States v. Insley, 130 U. S. 263; S 9:485; L 32:968.

[8]United States v. Snyder, 149 U. S. 210; S 13:846; L 37:705; Blacklock v. United States, 208 U. S. 75; S 28:228; L 52:396.

[9]Cases cited below. See Eminent Domain.

[10]Harris v. Elliott, 10 Pet. 25; L 9:333; United States v. Jones, 109 U. S. 513; S 3:346; L 27:1015.

[11]Kohl v. United States, 91 U. S. 367; L 23:449.

(Green Bay Co. v. Patten Co., 172 U. S. 58; S 19:97; L 43:364 and 173 U. S. 179; S 19:316; L 43:658, simply interprets certain specific dealings between the United States and a certain State to the effect that water-power incidentally created, in the course of improvement of a certain navigable river, became property of the United States, and, as such, was within its disposal).

[12]As, in the case of a Federal statutory Internal Revenue lien upon land of a distiller or the like. United States v. Snyder, 149 U. S.

2. Where, however, or in so far as, Congress has made no affirmative provision, express or implied, in this field, there is a certain degree of implied Federal concession in favor of the State law; and Federal Executive officials can, presumptively, in such situation, take non-statutory title to the United States, only in accordance with the forms prescribed by State law.[13]

§ 120. The Question of Devise or Legacy to the United States.

As we have seen, there exists, or arises (at the option of the United States) a direct relation between an owner of intra-State property and the United States, by virtue of which the United States may, with entire independence of State action or of State policy, of form or of substance, acquire such property, either by condemnation or through voluntary sale. This proposition may perhaps be deemed to point to the conclusion that intra-State capacity of devise or of bequest to the United States may be created by Congress, either (a) generally, or (b) to the extent to which, by State law, capacity of devise or bequest in favor of others than the United States exists. There seems to be nothing in the character of the Federal intra-State Sovereignty that would render the United States incapable of accepting a devise or legacy.[14]

Federal power, however, (if it exists) in this field, has not been exercised by Congress. The result is, that the United States, in the matter of intra-State devise or bequest to it, stands (assuming Federal power to exist) in the attitude last above dealt with; that is to say: it elects to take or not to take, as devisee or legatee, according as the State law does or does not empower a testator to make the United States a devisee or legatee.

Where, for example, a State statute, creating a capacity

210; S 13:846; L 37:705; Blacklock v. United States, 208 U. S. 75; S 28:228; L 52:396.

[13]United States v. Crosby, 7 Cr. 115; L 3:287 (ineffectuality of a deed of conveyance to the United States, without a seal, of land lying in a State,—the general law of the State requiring a seal).

[14]United States v. Perkins, 163 U. S. 625; S 16:1073; L 41:287.

of devise or legacy,[15] limited the testator's capacity, in respect of corporate beneficiaries, to corporations of the State, (or in other words, made corporations not of local creation, incompetent as devisees or legatees), a devise or bequest to the United States was held void.[16]

The same situation (of Federal election to stand, in the matter of devise or legacy, as an ordinary purchaser under State law) is presented when a State makes a legacy-tax provision an inherent feature and limitation of the power of bequest, (and in legal effect defines a legacy as the net fund after subtraction of the amount of the tax); and when the United States, (Congress not having acted in this field), is made a legatee, and presents itself as such. In such case, the United States takes the legacy as defined by State law,—that is, the face amount less the tax amount. In such case, there is no taxing of the United States; but only a definition—binding on all who claim under the State-granted legacy privilege—of the privilege.[17]

The decisions above cited are inherently capable of resting upon the theory of Congressional voluntary submission (by inaction) to State law and State policy,[18] and are consistent with the view of power in Congress to deal

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[15]It is familiar law that such power is the creature of affirmative law, and exists only at the will and by affirmative provision of a Sovereignty in question. See § 454, ¶ 2.

[16]United States v. Fox, 94 U. S. 315; L 24:192. The United States, in contending (as plaintiff in error) for the validity of the devise, was, of course, under the necessity of asserting the validity of the State statute, in its general aspect; for the power of testamentary disposition is not a natural right, but exists, where and in so far as it exists, only by statute; and if the State statute in question was void, in toto, there would be no devisee or legatee. The contention of the United States, therefore, was (necessarily and actually) that the statutory limitation to corporations of the State, was, in so far, at least, as it bore upon the United States, void, as an unlawful discrimination. It was, however, held a valid limitation as against the United States.

[17]United States v. Perkins, cited above.

A State succession-tax law, dealing with a specific legacy (to a private individual) of United States bonds, may be valid, as a (limitative) definition of the legacy privilege and of the actual (net) legacy. Plummer v. Coler, 178 U. S. 115; S 20:829; L 44:998.

[18]As in the situation presented in § 119, ¶ 2.

broadly and fully, in favor of the United States, with devise and legacy.

§ 121. Disposal of Property.

What has been said of purchase and holding, by the United States, of land within a State, is applicable, mutatis mutandis, to sale and conveyance by the United States, of such land.[19]

Where, or in so far as, Congress has made no specific provision, there is a presumption of intent of yielding to the general provisions of State law in mode and particulars of land transfer; as, the State law of Interpretation of deeds; of effect of laches; of rights of innocent purchasers.[20]

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[19]Thus, where, in establishing Statehood within and from a Federal area, the United States reserved, in title, a certain parcel of land, and occupied it (as it had theretofore occupied it) as a military post, it was competent to the United States, after establishment of Statehood, to plat the land into streets and lots, and so sell it. United States v. Illinois Centr. R. R., 154 U. S. 225; S 14:1015; L 38:971.

[20]United States v. Illinois Centr. R. R., 154 U. S. 225, cited above; Hardin v. Shedd, 190 U. S. 508; S 23:685; L 47:1156; United States v. Stinson, 197 U. S. 200; S 25:426; L 49:724; Whitaker v. McBride, 197 U. S. 510; S 25:530; L 49:857; Joy v. St. Louis, 201 U. S. 332; S 26:478; L 50:776.

CHAPTER XXI.

FEDERAL EXCLUSIVENESS, INHERENT OR POTENTIAL:—GRADES OF EXCLUSIVENESS:—GENERAL PRINCIPLES.[1]

§ 122. Three Grades of Exclusiveness.

Federal intrà-State Exclusiveness of power is of three grades, as follows:—

(1) In certain fields, such Exclusiveness is rigidly fixed by the Federal Organic law, and is absolute, and not capable of waiver or diminution by Congress.

(2) In certain other fields, Federal Exclusiveness exists, in the absence of Congressional action, but is capable of waiver or relaxation, to a greater or to a less degree, by Congress.[2]

(3) In certain other fields, the Federal Organic law does not, proprio vigore, establish actual Federal Exclusiveness, of either of the two classes above considered, but creates merely potential Federal Exclusiveness, in the discretion of Congress: as, in the fields of Bankruptcy; Pilotage; Standards of Weights and Measures; and (within certain limits) of control and improvement of navigable streams.[3]

§ 123. The Matter of Definition of These Grades, Respectively.

The definition of these grades, respectively, of Federal Exclusiveness, is, of course, matter of exclusive Federal competency. In respect of the third class of Exclusiveness, (above referred to), definition in a particular instance, is often a matter of Interpretation of Acts of Congress,—the main principles of such Interpretation being: (a) that entry by Congress into a particular field presumptively ex-

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[1]As to Federal Exclusiveness as particularly presented in Judicial Procedure, see under that general head, and under specific Procedure heads.

[2]As, in the so-called Wilson and Webb Acts, in their dealing with supra-State Commerce (§ 405).

[3]For a statement of the matter in question, see Southern Ry. v. Reid, 222 U. S. 424; S 32:140; L 56:257.

cludes State action and State law therefrom;[4] (b) that the presumption is not conclusive;[5] and (c) that the presumption yields perhaps most readily in the case of State action in furtherance of, or in supplementation of, Federal law.[6]

§ 124. Modes of Assumption, by Congress, of Federal Such Exclusiveness.

Since the matter of Federal Exclusiveness of the third plane is mere matter of Congressional policy, the mode of expression of such policy is immaterial.[7]

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[4]In re Loney, 134 U. S. 372; S 10:384; L 33:949 (when Congress has provided for affidavits before a State Notary Public, in Congressional election contests, the State has no power of punishment of perjury committed in such an affidavit); Easton v. Iowa, 188 U. S. 220; S 23:288; L 47:452 (State incapacity of punishment of receiving deposits as an officer of a national bank, with knowledge of insolvent conditions); Erie R. R. v. New York, 233 U. S. 671; S 34:756; L 58:1149 (State incapacity in respect of hours of labor of railroad employees, in view of the Congressional legislation in that field).

[5]Crossman v. Lurman, 192 U. S. 189; S 24:234; L 48:401 (Congressional Pure Food legislation as not excluding State power of character not inconsistent with the Federal law).

See under Commerce; Quarantine; Inspection Laws, and other general heads.

[6]New York v. Dibble, 21 How. 366; L 16:149 (State legislation providing for summary process of ejectment of intruders upon Indian lands within the State, such lands being protected also by Federal law). See also Marshall Dental Co. v. Iowa, 226 U. S. 460; S 33:168; L 57:300; Houston v. Moore, 5 Wh. 1; L 5:19; Fox. v. Ohio, 5 How. 410; L 12:213; Moore v. Illinois, 14 How. 13; L 14:306.

See § 175.

[7]Thus, where an Act of Congress is, by its terms, not to take immediate direct effect, it may take immediate indirect effect, to the result above mentioned, as a Congressional declaration of Public Policy. Erie R. R. v. New York, 233 U. S. 671; S 34:756; L 58:1149.

CHAPTER XXII.

Federal Unwritten Organic Law of Federal Immunity from State Action.

§ 125. General View.

Of the numerous features of the Federal Unwritten Organic law resting upon the Doctrine of Incident, one of the most fundamental is presented in the proposition: that in the field of its specific powers, the United States possesses complete Immunity, actual or potential, from State action tending to limitation of full or free action of the United States. It is proposed in this present chapter to present certain illustrations and peculiarly important examples of operation of this principle.

§ 126. Federal Immunity from State Condemnation Procedure.

Property within State, owned by the United States, is not subject to State taking under Eminent Domain procedure. A State municipal corporation cannot, for example, lay out a street over Federally-owned land.[1]

§ 127. Federal Immunity in Respect of Federal Officers.

It is within the scope of the Federal Sovereignty to exclude the States severally from jurisdiction over Federal officers acting as such.[2]

The mere fact, however, that an employee of the United States is adversely affected by a State classification, does not defeat a discrimination, otherwise just.[3]

§ 128. Federal Immunity Based upon Federal Taxation.

State taxation tending to limit or to interfere with Federal taxation is thereby, and to that extent, void. Thus, when the United States, by way of occupation-excise, requires a license-fee from dealers in intoxicating liquors, a State law requiring publication, State-filing, and posting,

[1]United States v. Chicago, 7 How. 185; L 12:660.

[2]Ohio v. Thomas, 173 U. S. 276; S 19:453; L 43:699. See § 130.

[3]Martin v. Pittsburg etc. R. R., 203 U. S. 284; S 27:100; L 51:184.

of the Federal license; an affidavit of such publication, and a fee to a State official in respect thereof, is void.[4]

§ 129. Federal Immunity from State Law, Generally.

What has been said of certain specific fields of Federal Immunity, is applicable, mutatis mutandis, to Immunity from State law in general. Illustration of this proposition may be given as follows:

(a) A State Statute of Limitations is (unless by Federal consent) not operative as against the United States. If, therefore the United States becomes the purchaser of negotiable paper, against which a State Statute of Limitations is, at the time, running, the Statute ceases to run.[5]

(b) State procedure cannot limit the right to, or the mode of, challenge, in a Federal court, of Jurisdiction.[6]

(c) A State statute forbidding action at law against an executor or administrator appointed within the State, is of no operation in a court of the United States.[7]

(d) A State Statute of Limitations cannot limit enforcement of a liability of shareholders in a national bank.[8]

(e) A State requirement of registration of liens, as a condition of validity, has no operation upon liens accruing to the United States under Federal law. A Federal statutory Internal Revenue lien, for example, takes and holds effect, without compliance with the terms of a State general lien record statute.[9]

(f) A Federal grant (out of land of the United States) of a railroad right of way—essential to compliance with a Federal franchise and with a Federal duty—is not subject to the State law of Adverse Possession.[10]

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[4]Flaherty v. Hanson, 215 U. S. 515; S 30:179; L 54:307.

[5]United States v. Nashville etc. Ry., 118 U. S. 120; S 6:1006; L 30:81.

A different question would arise in the case of land where the running of the period of limitation had, under State law, entered into the title as substance. See Remedy as Right, (§ 500, par. 2); Statutes of Limitation, (§ 643).

[6]Southern Pac. Co. v. Denton, 146 U. S. 202; S 13:44; L 36:942; Ohio v. Thomas, 173 U. S. 276; S 19:453; L 43:699.

[7]Suydam v. Broadnax, 14 Pet. 67; L 10:357.

[8]Rankin v. Barton, 199 U. S. 228; S 26:29; L 50:163.

[9]United States v. Snyder, 149 U. S. 210; S 13:846; L 37:705.

[10]Northern Pac. Ry. v. Townsend, 190 U. S. 267; S 23:671; L 47:1044; Northern Pac. Ry. v. Ely, 197 U. S. 1, 5; S 25:302; L 49:639.

(g) State Judicial attachment process is not competent to reach a fund in the hands of a United States marshal, as such.[11]

(h) In the absence of Federal concession, a State cannot exercise habeas corpus jurisdiction over one held under color of Federal authority.[12]

(i) Mere Federal origin of property does not exempt it from the usual burdens of property in general. Thus, privately held United States bonds are liable to seizure upon execution, or to other action in rem, as against the owner.[13]

Federal concession, in this field, has been carried so far as to leave subject to material-men's lien, under State statute, a vessel being built by contract for the United States.[14]

(j) Federally created corporations are left open to State regulation, within reasonable limits.[15]

(k) The rule De Minimis is applied, in Federal actual practice.[16]

§ 130. Federal Immunity from State Taxation of Federal Property.

Property owned, in whole or in part, by the United States is, pro tanto, exempt from taxation under State authority, unless by Federal concession and consent.[17]

The principle applies not only to property held by the United States for direct governmental use (as, a post-office

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[11]Buchanan v. Alexander, 4 How. 20; L 11:857.

[12]Tarble's Case, 13 Wall. 397; L 20:597.

[13]Scottish Union etc. Insurance Co. v. Bowland, 196 U. S. 611; S 25:345; L 49:619.

As to inoperativeness, as against the United States, of a State Insolvency discharge, see United States v. Wilson, 8 Wh. 253; L 5:610.

[14]United States v. Ansonia Brass Co., 218 U. S. 452; S 31:49; L 54:1007: (in this case the element was present that the United States was secured by a bond).

[15]Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; S 14:1047; L 38:1014; Reagan v. Mercantile Trust Co., 154 U. S. 413; S 14:1060; L 38:1028: (cases of State Railroad Commission's authority over Federally-incorporated railroads).

[16]United States v. Kirby, 7 Wall. 482; L 19:278; temporary detention of the mail, caused by State arrest of a mail carrier, on a charge of felony, not within an Act of Congress penalizing obstruction of the mails.

[17]Van Brocklin v. Tennessee, 117 U. S. 151; S 6:670; L 29:845: (a case of land bought in by the United States at a Federal tax sale and held by the United States under the title thus acquired).

site and building), or property held by the United States merely as a fund (as, in the case of public lands of the United States in State area proper),[18] but also to property held by law by the United States as trustee under an active trust.[19]

Such Federal Immunity is matter of Substantive law, not matter of Legislative or Executive Procedure. That is to say, it is not merely an exemption of the United States from State Procedure, as, of levy and sale; but an exemption of the property itself, as res, even from assessment during, or as of, the period of Federal ownership: so that an assessment, regular in form, but made during or as of, a period of Federal ownership, is a mere nullity, and is not capable of enforcement against the property after termination of the Federal ownership.[20]

Where the United States is owner only of an undivided part of a res, or only of part of the full legal title, the exemption of its part from State taxation does not extend to other parts (of the res or of the full title), but such other parts are subject to State taxation. Thus, a State may tax spirits in a United States bonded warehouse, to the extent of the general owner's interest as delimited by the special property of the United States.[21]

So, where the United States, being owner of a parcel of real estate within a State, sold and conveyed it to a private purchaser, on condition subsequent that a dry-dock, to be built (and in fact ultimately built) by the purchaser, should be open to free use by the United States; with provision for reverter to the United States in case of non-maintenance of the dry-dock; the State was competent to tax the private

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[18]Railway v. Prescott, 16 Wall. 603; L 21:373; Railway v. McShane, 22 Wall. 444; L 22:747; Tucker v. Ferguson, 22 Wall. 527; L 22:805; Colorado Co. v. Commissioners, 95 U. S. 259; L 24:495; Sargent v. Herrick, 221 U. S. 404; S 31:574; L 55:787.

[19]United States v. Rickert, 188 U. S. 432; S 23:478; L 47:532 (Indian lands).

[20]Sargent v. Herrick, 221 U. S. 404; S 31:574; L 55:787; Van Brocklin v. Tennessee, cited above.

[21]Carstairs v. Cochran, 193 U. S. 10; S 24:318; L 48:596; Thompson v. Kentucky, 209 U. S. 340; S 28:533; L 52:822; Hannis Distilling Co. v. Baltimore, 216 U. S. 285; S 30:326; L 54:842; Taney v. Penn Bank, 232 U. S. 174; S 34:288; L 58:558.

owner's interest: namely, the fee-simple subject to the condition subsequent.[22]

So, where, under the Federal public-land laws, full Equitable title has vested in a private individual, but a patent has not actually issued, and the United States has the legal title, but only as dry trustee, the private Equitable title is subject to State taxation.[23]

§ 131. The Same Immunity in Respect of Federal Instrumentalities in General.

Federal instrumentalities, in general, are exempt (unless by Federal consent) from the State taxing power. This principle has been applied to bonds or notes of the United States;[24] to bonds of a municipal corporation, issued under Territorial authority prior to Statehood;[25] to a bank incorporated by the United States as a feature of the Federal fiscal machinery;[26] to salaried Federal officers and their emoluments;[27] to business of the United States, conducted

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[22]Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375; S 25: 50; L 49: 242.

[23]Hussman v. Durham, 165 U. S. 144; S 17: 253; L 41: 664: (affirming Carroll v. Safford, 3 How. 441; L 11: 671 and Witherspoon v. Duncan, 4 Wall. 210; L 18: 339). See Northern Pac. Ry. v. Myers, 172 U. S. 589; S 19: 276; L 43: 564. See § 134.

So, as to natural incidents of such taxation; as, a requirement of furnishing lists of shareholders, and other important data. Waite v. Dowley, 94 U. S. 527; L 24: 181.

Mere consent by Congress to the erection of a bridge over a navigable stream does not exempt from State taxation. St. Joseph etc. R. R. v. Steele, 167 U. S. 659; S 17: 925; L 42: 315; Keokuk Bridge Co. v. Illinois, 175 U. S. 626; S 20: 205; L 44: 299.

[24]Weston v. Charleston, 2 Pet. 449; L 7: 481; other cases, cited immediately below.

The principle applies to such bonds constituting part of a fund (as, the capital of a bank) otherwise State-taxable. Bank of Commerce v. New York, 2 Bl. 620; L 17: 541; Bank Tax Case, 2 Wall. 200; L 17: 793; Society for Savings v. Coite, 6 Wall. 594; L 18: 897; Provident Institution v. Massachusetts, 6 Wall. 611; L 18: 907; Banks v. Mayor, 7 Wall. 16; L 19: 57; Bank v. Supervisors, 7 Wall. 26; L 19: 60; Home Sav'gs Bank v. Des Moines, 205 U. S. 503; S 27: 571; L 51: 901.

[25]Farmers Bank v. Minnesota, 232 U. S. 516; S 34: 354; L 58: 706.

[26]M'Culloch v. Maryland, 4 Wh. 316; L 4: 579; Osborn v. Bank of the United States, 9 Wh. 738; L 6: 204. See, however, now, National Banks.

[27]Dobbins v. Erie County, 16 Pet. 435; L 10: 1022.

through a private corporation;[28] and to property of a private corporation acting as a Federal instrumentality in respect of property of Indian Tribes. [29]

§ 132. The Practical Demarcation in Federal Tax Immunity.

In various fields, the Federal title or interest proceeds with gradual lessening, from (a) outright Federal ownership or broad Federal concern, at one extreme, to (b) practical insignificance, at the other extreme. In such a situation, no line of demarcation between presence or absence of dominant Federal title or concern can be drawn in abstract terms, nor is it possible to fix such a line approximately by Judicial decisions: for the reason that Congress has always been conservative in this field, and has seldom, if ever, attempted to exercise the Federal Immunity to its limits; so that the most that can be done, in respect of the debateable ground, is to present illustrations of the view taken by the Federal Judiciary of the proper practical line. Illustrations may be given as follows:

The mere fact of existence of contractual relations, for carrier service, between a railroad and the United States, does not, in and of itself, and in the absence of specific action of Congress, afford Immunity as against State taxation.[30]

A subject-matter immune from State taxation cannot be taxed indirectly, by taxation of some feature or incident of it.[31]

Federal tax-Immunity does not forbid enforcement upon United States bonds, privately owned, of a tax assessed upon other property, not Federally exempt.[32]

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[28]Williams v. Talladega, 226 U. S. 404; S 33:116; L 57:275; Telegraph Co. v. Texas, 105 U. S. 460; L 26:1067 (void State taxation including Government telegraphing).

State taxation of national banks is by express Congressional concession. See Hepburn v. School Directors, 23 Wall. 480; L 23:112; Commercial Bank v. Chambers, 182 U. S. 556; S 21:863; L 45:1227.

[29]Indian Oil Co. v. Oklahoma, 240 U. S. 522; S 36:453; L 60:779.

[30]Thomson v. Pacific R. R., 9 Wall. 579; L 19:792. So of surety corporations. Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319; S 36:298; L 60:664.

[31]Indian Oil Co. v. Oklahoma, 240 U. S. 522; S 36:453; L 60:779.

[32]Scottish Union etc. Insurance Co. v. Bowland, 196 U. S. 611; S 25:345; L 49:619.

§ 133. The Same Subject Continued:—Limitation, pro Tanto, upon Enforcement of a Valid State Tax.

When a State effectually taxes a private part interest in property partly owned by the United States, the State power of enforcement of the tax may be limited, by general principles of Immunity of the United States, from State disturbance of the possession of the United States, and must be dealt with from the standpoint of those principles, and not from the standpoint of Taxation. The difficulty, in such case, is not one of substance, but of Procedure.

Thus, a State, competent to tax a telegraph company, cannot, for remedy, interfere with the operation of a line in which the United States has a direct concern.[33]

So, State tax authorities cannot proceed forcibly to levy upon property (lawfully State-taxed) in the possession of a Federal Court, through its Receiver.[34]

§ 134. Property of Mere Federal Establishment, or Creation.

Whatever may be the power of Congress in respect of property which (or, the title to which) is created by or originates in Federal law, the presumption is that such property or title is open to State taxation: as, in the case of the plant of a Federally incorporated railroad,[35] or a Federally-granted mining-right.[36]

A State may tax Equitable land title derived from the United States prior to grant of legal title,[37] but not mere prospective such Equitable title.[38]

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[33]Western Un. Tel. Co. v. Massachusetts, 125 U. S. 530; S 8:961; L 31:790 (a case of acceptance by the Telegraph Co. of the Rev. Stats. § 5263).

[34]In re Tyler, 149 U. S. 164; S 13:785; L 37:689.

[35]Railroad v. Peniston, 18 Wall. 5; L 21:787.

[36]Forbes v. Gracey, 94 U. S. 762; L 24:313; Elder v. Wood, 208 U. S. 226; S 28:263; L 52:464.

Where a Government check, drawn on the United States Treasury, and good for four months, was held over a considerable period, it was State-taxable, as money in hand. Hibernia Sav'gs Soc'y v. San Francisco, 200 U. S. 310; S 26:265; L 50:495.

[37]Carroll v. Safford, 3 How. 441; L 11:671; Witherspoon v. Duncan, 4 Wall. 210; L 18:339; Hussman v. Durham, 165 U. S. 144; S 17:253; L 41:664.

[38]Railway v. Prescott, 16 Wall. 603; L 21:373; Railway v. McShane, 22 Wall. 444; L 22:747; Tucker v. Ferguson, 22 Wall. 527;

The Federal Bankruptcy Acts have, by implication, left open to State taxation, property held by trustees in Bankruptcy.[39]

L 22:805; Colorado Co. v. Commissioners, 95 U. S. 259; L 24:495; Wisconsin Centr. R. R. v. Price County, 133 U. S. 496; S 10:341; L. 33:687.

[39]Swarts v. Hammer, 194 U. S. 441; S 24:695; L 48:1060.

CHAPTER XXIII.

Analogous State Immunity, Within Certain Limits, From Federal Action.

§ 135. The General Principle.

In analogy to the doctrine, above considered, of Federal Immunity from State action, there exists the Federal doctrine (limitatively definitory of the Federal intra-State Sovereignty) of Immunity, in general, of a State, in its governmental functions and instrumentalities, from Federal action.

The doctrine is illustrated in the view that the salary of a State Judge is not Federally taxable;[1] or a bond required by a State from a private individual, as a condition to the issue to him of an occupation license;[2] or railroad bonds taken and held by a municipal corporation in return for municipal credit given to the railroad;[3] or, (apart from possible operation, now, to the contrary, of the Sixteenth Amendment), income from State municipal bonds.[4]

§ 136. Limitative Definition of the Principle.

The mere element of State affirmative action, in a given field of property (as, by granting a corporate franchise) does not extend to that property the Immunity of the State. Thus, if a bank be incorporated by a State, its notes (bank-bills) are not exempt from Federal taxation.[5]

So of interest paid (or payable and about to be paid) by State-created corporations upon their bonded indebtedness.[6]

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[1]Collector v. Day, 11 Wall. 113, 122 et seq.; L 20:122.

[2]Ambrosini v. United States, 187 U. S. 1; S 23:1; L 47:49.

[3]United States v. Railroad, 17 Wall. 322; L 21:597.

[4]Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429; S 15:673; L 39:759; and (on re-hearing) 158 U. S. 601; S 15:912; L 39:1108.

The decisions above cited are respectively capable, in strictness, of resting upon an interpretation (of the Acts of Congress in question) adverse by Comity, to Congressional intent to include State salaries, income, and the like.

[5]Veazie Bank v. Fenno, 8 Wall. 533; L 19:482.

[6]Railroad v. Collector, 100 U. S. 595; L 25:647.

So, the United States may take, by Eminent Domain, land taken and held under Eminent Domain franchise granted by a State.[7]

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[7]Monongahela Nav. Co. v. United States, 148 U. S. 312; S 13:622; L 37:463; United States v. Gettysburg Ry., 160 U. S. 668; S 16: 427; L 40:576.

CHAPTER XXIV.

State Citizenship.

§ 137. The Fourteenth Amendment.

By the Fourteenth Amendment, a citizen of the United States, domiciled within a State, is, by force of his Federal citizenship, a citizen of the State.

Any citizen of the United States may, at his pleasure, establish a domicil within any State,[1] and thereby become a citizen of the State.

§ 138. Other Federal Law, Actual or Potential.

The United States has, in addition, broad discretionary powers, operative—directly or indirectly—upon the matter of State citizenship. For example, the United States, may by Treaty, with a Foreign Power, or with an Indian Tribe, deal directly with the matter of State citizenship of aliens or of Tribal Indians, either in an affirmative or in a negative manner. The United States may, in respect of aliens, act, by way of refusal of admission, or by way of deportation after admission, with the incidental result of prevention or annulment of State citizenship.

§ 139. Aliens Not Capable of State Citizenship.

An alien may have a domicil within a State; and certain States, in practice, admit domiciled aliens to the voting franchise.[2]

Alienage would seem, however, to be inconsistent with State citizenship.[3]

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[1]Assumed in Pope v. Williams, 193 U. S. 621; S 24:753; L 48:817. As to length of residence for registration and voting, see case cited; and Privileges and Immunities (§§ 293, 294).

[2]See § 306.

[3]Thus, for the purposes of the Federal Original intra-State Judicial Jurisdiction, an individual is either a citizen of a State, or an alien; and dual capacity is not recognized.

CHAPTER XXV.

THE STATES AS NATIONS INTER SE:—INTER-TREATY POWER:—EQUALITY:—IMMUNITY.

§ 140. Treaty.

Inter-State Treaty power originated in and by the Declaration of Independence, and has continued to the present day.[1]

The Constitution—following the Articles of Confederation—requires Congressional consent.[2]

Consent of Congress may be given in any form that expresses the legislative intent: as, by action of Congress in creating a State out of area of an existing State, pursuant to conditions fixed by the original State in its Act of Consent, and recognized in the Constitution of the new State.[3]

Specific consent may include implied prospective consent to further Treaty, of incidental character.[4]

§ 141. Definition of Equality among the States.

The proposition of Equality as among the States, as of a particular period, past or present, is subject to certain definitory qualifications. Illustration may be presented as follows:—

(1) Prior to the Thirteenth Amendment, most of the States were competent, while certain others were not competent,[5] to maintain the institution of slavery.

(2) The State of Kentucky came into existence as a

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[1]As to the scope of the power, prior to the Constitution, see Declaration of Independence, § 13, ¶ 2.

[2]Const., Art. I, § 10:—

> No State shall, without the consent of Congress, * * * enter into any agreement or compact with another State.

[3]Green v. Biddle, 8 Wh. 1; L 5:547; Virginia v. West Virginia, 206 U. S. 290; S 27:732; L 51:1068.

[4]North Carolina v. Tennessee, 235 U. S. 1; S 35:8; L 59:97.

[5]Ordinance of 1787 (see Appendix) as to Free and Slave future State area; Missouri Compromise; proceedings of admission of Texas (inhibition of Slavery in such new States as should be formed out of Texas, North of the Missouri Compromise line).

State with limitations of the ordinary State Sovereignty over land title.[6]

(3) One certain State is under exceptional limitation in respect of polygamy.[7]

(4) In a number of instances, the Sovereignty of a State is not exclusive over its whole water area, but is, to a greater or less extent, subject to concurrent Sovereignty of a sister State.[8]

(5) A State formed out of Federal area is limited by executed Treaty, or grant, of or from the United States, antedating Statehood: as, in respect of Indian water rights or fishery rights.[9]

§ 142. The Question of Inter-State Immunity.

We have considered elsewhere[10] the Unwritten Federal doctrines: (a) of Federal Immunity as against State action and (b) of State Immunity as against Federal action. A corresponding Federal doctrine may perhaps be assumed to prevail, to some extent, as between States; but it does not so prevail with the same breadth as in the relations above mentioned. Thus, bonds issued by a State are not, merely by their character as State bonds, exempt from taxation, in the hands of the holder, in another State.[11]

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[6]Green v. Biddle, 8 Wh. 1; L 5:547; Hawkins v. Barney's Lessee, 5 Pet. 457; L 8:190.

[7]Proceedings of admission of Utah. (We assume here the validity and the exceptional character of the limitation).

[8]Green v. Biddle; Hawkins v. Barney's Lessee, both cited above; Henderson Bridge Co. v. Henderson City, 173 U. S. 592; S 19:553; L 43:823; Wedding v. Meyler, 192 U. S. 573; S 24:322; L 48:570 (Virginia-Kentucky Compact); Neilsen v. Oregon, 212 U. S. 315; S 29:383; L 53:528 (Columbia River); Devoe Mfg. Co., Pet'r, 108 U. S. 401; S 2:894; L 27:764; Central R. R. v. Jersey City, 209 U. S. 473; S 28:592; L 52:896 (both as to surface and bed of the lower Hudson River).

[9]United States v. Winans, 198 U. S. 371; S 25:662; L 49:1089; Winters v. United States, 207 U. S. 564; S 28:207; L 52:340.

[10]§§ 125-134; 135, 136.

[11]Bonaparte v. Tax Court, 104 U. S. 592; L 26:845.

We do not undertake to consider the question of power of Congress in this field.

CHAPTER XXVI.

THE UNITED STATES AND A STATE AS, TO CERTAIN INTENTS, CO-ORDINATE NATIONS:—TREATY (UNDER ONE OR ANOTHER DESIGNATION), BETWEEN THE UNITED STATES AND A STATE.

§ 143. Different Designations of Treaty.

Treaty, in its higher and strictly Foreign aspect, is commonly designated in terms, as "Treaty." In the field now in question, the term "compact" would more commonly be employed; and Treaty may exist in the external form of mere contract or agreement.[1]

The Constitution employs such terms as are in question, as equivalents, in its textual dealing with State action.[2]

§ 144. State Cession as Treaty:—"Consent" as Treaty.[3]

State cession to the United States, of Sovereignty over a portion of State area (acceptance by the United States being, upon general principles, essential to effectuality) is Treaty.

§ 145. Origin of the Treaty-Power Relation in Question.

The Treaty-power relation between the United States and a State originated as Unwritten Federal Organic law, prior to the Constitution,[4] and was not adversely affected, in any general way, by the Constitution; and the text above cited,

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[1]As to Treaty as Contract, see Contract.

[2]Const., Art. I, § 10:—

No State shall enter into any treaty, alliance or confederation; * * *

No State shall, without the consent of Congress, * * * enter into any agreement or compact with another State or with a foreign power, * * *

[3]Art. I, § 8:—

To exercise exclusive legislation * * * over such district * * * as may, by cession of particular States and the acceptance of Congress * * * like authority over all places purchased by the consent of the legislature of the State in which the same shall be, * * *

For particular consideration of this text, see Ceded Places.

[4]§ 13, ¶ 2.

in its affirmative aspect, is, as far as it goes, merely declaratory, and is not exhaustive of the Federal Organic law of the subject.[5]

§ 146. Treaty Between the United States and an Inchoate State:—In Enabling Acts.

Pursuant to the general doctrine of presumed acceptance by a prospective (and ultimately actual) Sovereign or quasi-Sovereign political society, of a proffered Treaty provision favorable to it,[6] a so-termed "Enabling Act" (that is, an Act of Congress creating a new State, in and from Federal area) is a Treaty between the United States and the new State in question.[7]

§ 147. Cession:—Bi-lateral Aspect.

What has been said of cession of Sovereignty from a State to the United States is applicable, mutatis mutandis, to cession of Sovereignty by the United States to a State. Such cession is presented (under an express provision of the Constitution) in the creation of a State out of Federal area.[8]

§ 148. Scope of the Potential Field of Treaty Between the United States and an Actual or an Inchoate State.

It may be said, in a general way, that the field of Treaty competency, as between the United States and a State, extends to all matters that may be fairly viewed as of Federal concern; but excludes all matters not of Federal concern.

Thus, it is competent to the United States to bind itself, by Treaty with a State, to the transfer by the United States to the State, of certain public lands of the United States;[9] and Treaty competency extends to the matter of inter-State roads and canals.[10]

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[5]Authorities cited below.

[6]As in the case of the Virginia-Kentucky Compact (q. v.), and of the Northwest Ordinance (q. v.).

[7]Cases cited below. [8]See below.

[9]Beecher v. Wetherby, 95 U. S. 517; L 24:440; Cooper v. Roberts, 18 How. 173; L 15:338; Alabama v. Schmidt, 232 U. S. 168; S 34:301; L 58:555.

[10]Searight v. Stokes, 3 How. 151; L 11:537; Neil v. Ohio, 3 How. 720; L 11:800; Achison v. Huddleson, 12 How. 293; L 13:993; Indiana v. United States, 148 U. S. 148; S 13:564; L 37:401; United States v. Michigan, 190 U. S. 379; S 23:742; L 47:1103.

Prior to the Thirteenth Amendment, it extended to the matter of Slavery.[11]

On the other hand, the competency does not extend to the matter of location, within a new State, of the State Capital, even for a limited term of years,[12] (that matter being one of pure internal State polity, and not, in any aspect of it, of Federal concern).

§ 149. Legal, or Equitable, Character.

A Treaty, between the United States and a State may be of legal or of Equitable character.[13]

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[11]See "Equality of States" (Question of), §§ 140-142 and illustrations there cited.

[12]Coyle v. Oklahoma, 221 U. S. 559; S 31:688; L 55:853.

[13]United States v. Michigan, 190 U. S. 379; S 23:742; L 47:1003 (land conveyed by the United States to a State, upon an Equitable trust).

CHAPTER XXVII.

State Officials As Federal Officials.

§ 150. The Subject Generally.

In various classes of State office, and of situations thereunder, a State official is, ex officio—to a greater or to a less extent—a Federal official. The principle may be illustrated as follows:—

(1) The State-cession clause of the Constitution vests in the State Legislatures Federal power of such cession.[1]

(2) Federal official character super-imposed by Federal law upon State Legislatures was, until recently, illustrated in duty of choice of United States Senators, and in particulars of mode of exercise of that duty; and in power in Congress of particularization of the Federal Constitutional requirement in that respect.[2]

It is now illustrated in a variety of like fields: as, that of provision for election of Representatives in Congress.

(3) The Constitution specifically imposes, upon State Judges, duty of affirmative enforcement, in general, of Federal law not of Criminal or Penal character. In so far, such Judges are not within State control, but are of exclusive Federal duty and status.[3]

(4) By action of Congress, State Courts or Judges are effectually vested with naturalization Jurisdiction; and with compulsory Jurisdiction over seamen.[4]

(5) Where Congress has, in a Federal field, provided for affidavits before a State magistrate, perjury in such affidavits is a Federal offence, and is not within the general State perjury statutes.[5]

(6) False swearing, committed in the course of naturalization procedure in a State court, may be dealt with by

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[1]See § 77.

[2]I. e., the Joint Ballot Congressional provision.

[3]See State Courts: Duty of Enforcement of Federal Law (§ 657).

[4]Robertson v. Baldwin, 165 U. S. 275; S 17:326; L 41:715.

[5]In re Loney, 134 U. S. 372; S 10:384; L 33:949.

Congress, as perjury and as a crime against the United States.[6]

(7) Federal law may create, for State Executive officials, duties within their respective general fields of action. Thus, it is, as matter of Federal law, compulsory upon a State Tax official, to the extent of his general authority under State law, to enforce State taxation for the satisfaction of a Federal judgment; and Mandamus lies from a Federal Court, direct to such an official, for enforcement of his Federal duty in this respect.[7]

(8) Federal official character and status, of State sheriffs, in charge of Federal prisoners, is illustrated in subjectivity of such officials to Federal Contempt Procedure for failure to keep a Federal prisoner.[8]

(9) A State official, acting under a (valid) State statute, is charged with a Federal duty of observing the Equal Protection of Law provision of the Fourteenth Amendment, and is Federally punishable, Criminally, for violation of the Federal duty.[9]

(10) State Election officers are punishable by Congress for fraudulent action in respect of an election of Federal concern.[10]

(11) The dual character (Federal and State) of a State official thus Federally dealt with is illustrated in the doctrine: that where Congress allows to Clerks of State Courts a certain part of naturalization fees, the State may take over the Clerk's such share of such fees.[11]

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[6]Holmgren v. United States, 217 U. S. 509; S 30:588; L 54:861.

[7]See Mandamus to State Officials (§§ 715-717).

[8]United States v. Shipp, 214 U. S. 386; 215 U. S. 580; S 29:637; L 53:1041; S 30:397; L 54:337.

[9]Virginia, Ex parte, 100 U. S. 339; L 25:676; Wiley v. Sinkler, 179 U. S. 58; S 21:17; L 45:84. In such case, it will be observed, the Fourteenth Amendment does not take direct operation upon the official,—since that Amendment is aimed only at (colorable) State action, and the officials, in the case cited, acted in violation of State law, and had no color of State authority. The Amendment, therefore operated, only to vest in Congress power of vesting in the State Officials Federal duty of Equal Protection of the Laws.

[10]Ex parte Siebold, 100 U. S. 371; L 25:717.

[11]Mulcrevy v. San Francisco, 231 U. S. 669; S 34:260; L 58:425. As to State voters, as Federal voters, see § 306.

CHAPTER XXVIII.

FEDERAL INTRA-STATE PRIVATE CORPORATIONS:—STATE PRIVATE CORPORATIONS:—A STATE AS A PRIVATE CORPORATION.

§ 151. Federal Corporations.

Congress may, by way of Incident to more specific powers, create private corporations within a State area proper; as, for the building and maintenance of an inter-State bridge;[1] or, a fortiori, for more general purposes.[2]

§ 152. State Corporations.

1. The proposition has, in the past, been advanced in argument, that a private corporation franchise granted by a State, vested in the corporation the Immunity of the State as against Federal action. The grant of such a franchise is, however, mere legislation; and is subject, like State legislation in general, to Federal law.[3]

The character and status, and the internal affairs generally, of a State-created private corporation are subject to Federal Inquiry to the extent of Federal requirements.[4]

A State-created corporation may be subjected by Congress to Criminal liability for acts done by its agents in the course of their employment, on the theory of constructive tort.[5]

2. A State may itself enter a field of private activity; and, in such case, it is, pro tanto, in the view of the Federal

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[1]Luxton v. North River Bridge Co., 153 U. S. 525; S 14:891; L 38:808; other cases.

[2]National Volunteer Home v. Parrish, 229 U. S. 494; S 33:944; L 57:1296. So, of national banks.

[3]See under Monopoly and Restraint of Trade; Commerce.

[4]Minneapolis v. Street Ry., 215 U. S. 417; S 30:118; L 54:259; Berea College v. Kentucky, 211 U. S. 45; S 29:33; L 53:81. See also under Commerce.

[5]New York Centr. R. R. v. United States, (No. 1), 212 U. S. 481; S 29:304; L 53:613; various other cases.

As to municipal corporations of a State, and as to quasi-public incorporated State instrumentalities, see Municipal Corporations.

law, a private corporation. It is, for example, in respect of its instrumentalities in such field, subject to Federal taxation.[6]

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[6]Dealing in spirituous liquors:

South Carolina v. United States, 199 U. S. 437; S 26:110; L 50:261.

Banking:

Briscoe v. Bank of Kentucky, 11 Pet. 257; L 9:709; Louisville etc. R. R. v. Letson, 2 How. 497; L 11:353; Darrington v. State Bank of Alabama, 13 How. 12; L 14:30; Curran v. Arkansas, 15 How. 304; L 14:705.

CHAPTER XXIX.

Republican Form of Government.[1]

§ 153. The Subject Generally.

The term "guarantee" is plainly used, in the text cited, in its broad general sense, of "assure."

To a certain extent, the definition, in a particular instance, of the term "Form of Government," may be assumed to be matter of Political law, and, as such, of Exclusive Congressional competency.[2] To a certain extent, however, at least in the absence of Congressional action, the matter is of Juridical character, and of potential Federal Judicial cognizance.

Certain principles, Judicially recognized, are as follows:—

A State is under no Federal obligation of having a Written Constitution, in the modern American sense of the term Constitution: that is to say, a Written Form of Government removed from mere Legislative power of the State;[3] or to keep Legislative, Executive, and Judicial powers separate, in different sets of officials;[4] or to maintain a

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[1]Const., Art. III, § III:—

The United States shall guarantee to every State in this Union a Republican Form of Government.

[2]See Political Law, (§§ 312, 313); Davis v. Ohio, 241 U. S. 565, 569; S 36:708; L 60:1172.

[3]As in the case of Rhode Island, down to 1842. See Luther v. Borden, 7 How. 1, 35; L 12:581.

[4]Dreyer v. Illinois, 187 U. S. 71; S 23:28; L 47:79; Prentis v. Atlantic Coast Line, 211 U. S. 210; S 29:67; L 53:150; Detroit &c. Ry. v. Michigan R. R. Comm., 235 U. S. 402; S 35:126; L 59:288.

See, also, Rasmussen v. Idaho, 181 U. S. 198; S 21:594; L 45:820; Moyer v. Peabody, 212 U. S. 78; S 29:235; L 53:410; Pullman Co. v. Knott, 235 U. S. 23; S 35:2; L 59:105; Louisville & Nashv. R. R. v. Garrett, 231 U. S. 298; S 34:48; L 58:229.

A State may delegate to its Judicial tribunals, or to its Judges, such matters as the establishment of drainage districts and the like (O'Neill v. Leamer, 239 U. S. 244; S 36:54; L 60:249); or Legislative power. Bacon v. Rutland R. R., 232 U. S. 134, 137; S 34:283; L 58:538.

strictly Representative Frame of Government; but may have popular Initiative, or Referendum.[5]

Subject to general Federal principles of Equal Protection of Law, the Form of Government need not be uniform throughout the area of the State.[6]

So, a fortiori, in minor governmental planes: as, in powers of municipal officials and the like.[7]

A State may carry on, at its pleasure (through higher or lower officials or public incorporations) business not inherently governmental (as, the supply of water, gas or electric light; the building and ownership of railroads); and may proceed so far in this course as to cease, to various important Federal intents, to be a State, but to be a private corporation.[8]

A State may limit public employment, even of lower grades, to citizens of the State.[9]

It may prescribe a limit of working hours for employees of the State or of its political subdivisions.[10]

Adult citizens of the United States are not, merely as such citizens, entitled to voting suffrage.[11]

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[5]Pacific States Teleph. etc. Co. v. Oregon, 223 U. S. 118; S 32:224; L 56:377; Kiernan v. Portland, 223 U. S. 151; S 32:231; L 56:386.

[6]Kiernan v. Portland, cited above (local initiative or referendum); Missouri v. Lewis, 101 U. S. 22; L 25:989 (different Courts of Appeal for different parts of the State). See §§ 497-499 (Equal Protection of the Laws).

[7]In re Sawyer, 124 U. S. 200; S 8:482; L 31:402; Wilson v. North Carolina, 169 U. S. 586; S 18:435; L 42:865; Wilson v. Eureka, 173 U. S. 32; S 19:317; L 43:603; Home Telephone Co. v. Los Angeles, 211 U. S. 265; S 29:50; L 53:176.

[8]See State as a Private Corporation, § 152, ¶ 2.

[9]Heim v. McCall, 239 U. S. 175; S 36:78; L 60:206.

[10]Atkin v. Kansas, 191 U. S. 207; S 24:124; L 48:148. See Municipal Corporations.

[11]Minor v. Happersett, 21 Wall. 162; L 22:627 (the Fourteenth Amendment not operative to this end, in favor of women citizens of a State). See § 306.

CHAPTER XXX.

Intra-State Insurrection Aimed at the United States.

§ 154. The General Principle.

Insurrection within a State, aimed, directly or indirectly, at the United States, falls within the general texts of the Constitution dealing with the supremacy, and with enforcement, of Federal law.[1]

§ 155. Insurrection Assuming a Semblance of State Action.

If in a State, an Insurrection against the United States is of sufficient numbers and influence to (and does) obtain control of the State governmental machinery, and goes through procedure—regular, in form—of enactment of State law, Organic or non-Organic, sympathetic with the Insurrection, the situation thereby created is precisely the same in law as in the case of any instance of State enactment (with regularity of form) of law conflicting with Federal law: that is to say: (a) such formally created law is, by force of the Federal law, null and void; and (b) leaves pre-existing valid State law unaffected; and (c) as to new State law, is itself valid, in so far as the valid and the invalid parts are, under general principles, separable; and valid existing State laws, therefore, of governmental action—whether of Legislative, Executive, or Judicial character—remain in force; and procedure not sympathetic with the Insurrection may go on, under them, as if there were no Insurrection,[2] while action in any form, sympathetic with the Insurrection, is of no validity.[3]

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[1]See below.

[2]As, ordinary Probate Procedure (Ketchum v. Buckley, 99 U. S. 188; L 25:473; Baldy v. Hunter, 171 U. S. 388; S 18:890; L 43:208; as to the Confederate bonds feature of this case, see a later section); Judicial Procedure generally (White v. Cannon, 6 Wall. 443; L 18:923; recognizing Error from the Supreme Court of the United States to a State Court, upon a judgment rendered pending such Insurrection); corporation charters (United States v. Insurance Companies, 22 Wall. 99; L 22:816); and ordinary governmental action, generally. Johnson v. Atlantic, Gulf etc. Transit Co., 156 U. S. 618; S 15:520; L 39:556.

[3]As, an attempt at sequestration of property of persons, resident or non-resident, present or absent (Williams v. Bruffy, 96 U. S. 176;

§ 156. Power of the United States to Administer Valid State Law.

In such situation, the Federal Executive Branch may administer valid State law, either by taking over and controlling the State governmental machinery,[4] or through Federal Civil tribunals established for the purpose by Executive order,[5] or through Federal Military Courts.[6]

§ 157. Belligerency.

If such an Insurrection assumes proportions of magnitude, the doctrine of Belligerency, of the Law of Nations, (existing by tacit adoption as Federal Unwritten law), becomes pertinent, and is applicable, with adaptation of it to the specific particulars of the situation.[7]

§ 158. Private Non-Sympathetic Dealing with the Insurrection.

Private dealing with the Insurrection is not fatal to validity, if such dealing be not sympathetic with the Insurrection.[8]

L 24:716; Stevens v. Griffith, 111 U. S. 48; S 4:283; L 28:348; Dewing v. Perdicaries, 96 U. S. 193; L 24:654): a suit against an officer of the army of the United States, based on his action, as such, in the suppression of the Insurrection (Dow v. Johnson, 100 U. S. 158; L 25:632: the State Court being, pro tanto, in the strict sense, destitute of jurisdiction, and its judgment, even upon default, being an absolute nullity). See Ford v. Surget, 97 U. S. 594; L 24:1018; Dewing v. Perdicaries, cited above.

[4]See Texas v. White, 7 Wall. 700; L 19:227.

[5]The Grape Shot, 9 Wall. 129; L 19:651; Mechanics' Bank v. Union Bank, 22 Wall. 276; L 22:871.

[6]Coleman v. Tennessee, 97 U. S. 509; L 24:1118: (a Federal Court Martial judgment upon charge of violation of State Criminal law, a bar to subsequent State prosecution after the suppression of the Insurrection).

[7]The William Bagaley, 5 Wall. 377; L 18:583; Young v. United States, 97 U. S. 39; L 24:992; Ford v. Surget, 97 U. S. 594; L 24:1018; Gates v. Goodloe, 101 U. S. 612; L 25:895; Carson v. Dunham, 121 U. S. 421; S 7:1030; L 30:992; Austin v. United States, 155 U. S. 417; S 15:167; L 39:203; Williams v. Paine, 169 U. S. 55; S 18:279; L 42:658.

[8]The mere reference to, and adopting of (in a contract during the Civil War) of Confederate money as a standard of value, had no adverse operation upon the validity of the contract, in the view of the Federal law, and the value, at the time material, may be inquired into. Thorington v. Smith, 8 Wall. 1; L 19:361; Wilmington etc. R. R. v.

§ 159. Insurrection Assuming the Form of a Confederacy of States.

1. Since Insurrection gains nothing in status by using State governmental machinery, and by assuming the form of State action, it follows that Insurrection, of such State semblance, gains nothing by assuming the form of a confederacy of States. Thus, such a confederacy has not, in respect of civil matters, the status of a de facto political society.[9]

It may, however, in its aspect of an insurrectionary movement of magnitude, reach the plane of a Belligerent, and stand (in place of its component State insurrectionary groups) as a Belligerent.[10]

2. Action of Legislative form, of such a Confederacy may, indirectly, become (colorable) action of a State.[11]

§ 160. "Reconstruction."

Congress has power, as an Incident of suppression of the Insurrection, to pass legislation necessary or proper for rehabilitation of a State. The question of necessity or propriety is a question of Political Law,[12] and, thereby, is not of Judicial character, but is within the discretion of Congress.[13]

King, 91 U. S. 3; L 23:186; Effinger v. Kenney, 115 U. S. 566; S 6:179; L 29:495.

[9]Hickman v. Jones, 9 Wall. 197; L 19:551; (Courts of "the Confederate States of America" not Federally recognizable as having been de facto Courts); Lamar v. Micou, 112 U. S. 452; S 5:221; L 28:751.

[10]Ford v. Surget, 97 U. S. 594; L 24:1018. See Mauran v. Insurance Co., 6 Wall. 1; L 18;836.

[11]Thus, what was in form a law of the Confederate States of America, became (by tacit acceptance, recognition, and enforcement, by the governmental machinery of a State), law of the State, within the meaning of, and for the purposes of, the Federal Judiciary Acts; and was subject to the Appellate Jurisdiction of the United States (and to adjudication of nullity). Williams v. Bruffy, 96 U. S. 176; L 24:716; Ford v. Surget, cited above.

[12]See Political Law (§§ 312, 313).

[13]Georgia v. Stanton, 6 Wall. 50; L 18:721; Texas v. White, 7 Wall. 700; L 19:227 (a case of suit in the name and in behalf of a State, maintained by Federal officers representing the State; criticized in Morgan v. United States, 113 U. S. 476; S 5:588; L 28:1044; but not upon points now in question).

CHAPTER XXXI.

POWERS BASED UPON INHERENT AND NECESSARY STATE INCAPACITY:—FEDERAL POWER AS BROADLY COMPLEMENTARY TO STATE POWER:—NO LACUNÆ.

§ 161. The General Principle.

Apart from certain fields of action (elsewhere specifically dealt with) closed by the Federal Organic law both to Congress and to the States severally,[1] there are various broad fields of action, not so closed, and necessarily to be dealt with, with which the States, severally, by the areal limitation of State Sovereignty, are inherently incapable of dealing otherwise than in respect of mere non-essential details. In, and in respect of such fields, and in respect of their natural Incidents, Federal power exists, apart from specific Constitutional text, by reason of, and as a necessary result of, the State incapacity.[2]

The principle is broadly and conspicuously operative, for example, in the Federal definition and delimitation of State Sovereignty as between or as among States, and as between a State and a Federal State.[3]

§ 162. Relation of the Principle to the General Welfare Texts.

The principle in question, while of inherent and necessary character, is capable of being rested upon (although not as necessarily exhaustive of) the "general welfare" texts of the Constitution.[4]

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[1]As, by the Due Process texts of the Fifth and the Fourteenth Amendments.

[2]Andrews v. Andrews, 188 U. S. 14, 32; S 23:237; L 47:366: "It cannot be doubted" * * *

[3]Book III, generally (§§ 213 et seq). See Inter-Areal Streams; State Boundary Lines.

[4]Const., Preamble:—
* * * in order to promote the general welfare * * *.
Const., Art. I, § 8:—
The Congress shall have power to lay and collect taxes, * * * to provide for the general welfare of the United States * * *.

§ 163. Congressional Power as Thus Broadly Complementary to State Power:—No Lacunæ.

Corollaries of the principle above considered are: (1) that the Congressional intra-State powers, in the aggregate, are (apart from the specific closed fields above referred to) exhaustively complementary to State powers; and (2) that there are no lacunæ between Congressional power and State power, outside of such closed fields.

§ 164. Federal Judicial and Executive Power.

What has been said specifically of Congressional power is applicable, mutatis mutandis, to Federal Executive and Federal Judicial power.[5]

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[5]Book IV, generally. See Inter-Areal Streams; State Boundaries.

CHAPTER XXXII.

DEFINITION AND DELIMITATION OF THE FEDERAL SOVEREIGNTY, ACCORDING TO COMMERCE AS INTRASTATE OR SUPRASTATE:—DEFINITION OF COMMERCE IN THESE ASPECTS RESPECTIVELY:—(a) GENERAL VIEW.[1]

§ 165. Inherent and Necessary Federal Power over Suprastate Commerce, Apart from Specific Constitutional Provision.

We have considered at an earlier point,[2] in its general aspects, the two-fold principle: (a) of inherent and necessary State incapacity, in certain fields; and (b) of Federal intra-State power arising, in such fields, as a corollary of such State incapacity. That principle, in its such two-fold aspect, would, apart from specific Constitutional texts, be applicable to, and operative in, the field of suprastate Commerce. No one State can exercise Sovereignty over another State, over a Federal area, or over Foreign area; and it follows, (a) that a particular Commerce transaction conducted partly, but not wholly, within the area (and within the area proper) of one certain State, is inherently and generically incapable of being dealt with (apart from nonessential local details) by such State; and (b) that it is capable of being dealt with (apart from such details) by, and only by, the United States.

§ 166. The Specific Constitutional Text.

1. Owing to the necessary absence, in 1787, of a general clear prospective view of Federal-State relations, as they would be left by the Constitution apart from specific Con-

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[1]For convenience, different portions of the general subject are treated in a series of five successive Chapters.

As to the use of the term "suprastate", see Uses of Terms, at the beginning of the treatise.

For brevity, the terms "intercommerce" "intertransit", "intertraffic", "interferriage", and the like, are employed in designation of different forms or aspects of suprastate Commerce.

As to the distinction between the forms "intrastate" and "intra-State"; "intrastate" and "inter-State", etc., see Uses of Terms, ubi supra.

[2]§§ 161, et seq.

stitutional text, the framers of the Constitution chose to deal (to a certain extent, although not exhaustively),[3] with the matter now in question, in what is commonly termed the Commerce Clause;[4] and, consequently, and notwithstanding the lack of exhaustiveness of that text,[5] the Federal suprastate Commerce power is commonly spoken of as resting upon the Commerce clause.

2. The "Indian Tribes" portion of the Commerce clause, we may here observe, is merely declaratory of one aspect of the Federal Paramount Sovereignty, intra-State and extra-State,[6] over, and in respect of, Indian Tribes and Tribal Indians.

3. We have spoken above of the Commerce clause as being not exhaustive of the field of suprastate Commerce, as such. Its lack of exhaustiveness appears in the fact that the clause fails to deal with Commerce between the area proper of a particular State, and Federal area, whether within or without the State; but leaves that matter to be governed by general principles of Federal Sovereignty;[7] that is to say: (a) by the principle considered in the preceding section, and (b) by the general principles of the Federal Plenary Sovereignty in and in respect of Federal area,[8] in a collective operation of those principles.

4. We may here observe that the Commerce clause overlaps, to a certain extent, certain other specific texts of the Constitution. Thus, a class of suprastate Commerce transaction, within the Commerce clause, may be also within the Admiralty provisions of the Constitution;[9] within the

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[3]See below.

[4]The Congress shall have power * * * To regulate commerce with foreign nations and among the several States, and with the Indian tribes.

[5]See below. [6]Book II, Part I (§§ 28 et seq.).

[7]As in El Paso etc. Ry. v. Gutierrez, 215 U. S. 87, 95; S 30:21; L 54:106; Hanley v. Kansas City So. Ry., 187 U. S. 617; S 23:214; L 47:333.

[8]Book II, Part II, (§§ 28 et seq.).

[9]Gibbons v. Ogden, 9 Wh. 1; L 6:23; Passenger Cases, 7 How. 283; L 12:702; The James Gray v. The John Frazier, 21 How. 184; L 16:106; The Lottawanna, 21 Wall. 558, 577; L 22:654; Foster v. Master and Wardens, 94 U. S. 246; L 24:122; Lord v. Steamship Co., 102 U. S. 541; L 26:224; Moran v. New Orleans, 112 U. S. 69; S 5:38; L 28:653; In re Garnett, 141 U. S. 1, 13; S 11:840; L 35:631.

War text;[10] within the Post-Office and Post-Road text;[11] or within the Tonnage-tax text.[12]

§ 167. Indirect State Power, to a Certain Extent, through State Corporate Franchises.

The power of the States severally (a) to create, or (b) to refrain from creating, private corporations, and (c) in creating a corporation, to fix the terms of incorporation, involves the Incident of power, in creating a corporation, to deal, to a certain extent, incidentally, with intercommerce business of the corporation.[13]

This is simply to say, that a State-chartered corporation exists as, and only as, its life and powers are given to it by the State.[14]

So, a State may tax a domestic corporation upon the privilege of corporate existence, none the less that the corporation be engaged in intercommerce.[15]

§ 168. Foreign Corporations.

The State power (existing in general) of exclusion of foreign corporations, or of imposing, at will, conditions of admission, does not extend to corporations engaged (and as engaged) in intercommerce; but such corporations may

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[10]The New York, 3 Wh. 59; L 4:333: (dealing with Foreign commerce from the standpoint of the Federal War Power, as represented in a Non-Intercourse Act.)

[11]See International Textbook Co. v. Pigg, 217 U. S. 91; S 30: 481; L 54: 678.

[12]Steamship Co. v. Portwardens, 6 Wall. 31, 32, 34, 35; L 18:749; (a vessel—taxable as such, by a particular State—not taxable in respect of, and from the standpoint of, its entrance into a port of the State, in an interstate voyage).

[13]Thus, a State, in incorporating a railroad for domestic operation, but with privilege of acquisition and operation (under extra-State authority) of extra-State trackage, may prescribe, as a feature of the corporate franchise, a requirement of payment to the home State, of a portion of the earnings from such extra-State operation. Railroad v. Maryland, 21 Wall. 456; L 22:678.

So of consolidation of corporations. Mobile etc. R. R. v. Mississippi, 210 U. S. 187; S 28: 650; L 52: 1016.

[14]As to accrual to the Federal Sovereignty of corporate status as (and to the extent to which) granted by the State, see §§ 101, 102. See also State Corporations (§ 152).

[15]Kansas City Ry. v. Kansas, 240 U. S. 227; S 36:261; L 60:617 (tax graded according to the amount of the capital stock).

enter, and transact business in, a State, as matter of Federal right.[16]

A State into which a foreign corporation enters may, however, tax the corporation upon so much of its capital stock as is used in intrastate commerce within such State, provided there is no adverse discrimination.[17]

So, in respect of capital stock employed outside the taxing State, but not in intercommerce.[18]

§ 169. Domestic Vessels.

A vessel having its home port and situs within a certain State, is, from the standpoint of intercommerce, on the same footing, there, as other vessels. Thus, it is not subject to a portwarden tax, by the home State, upon entering the State, in the carrying on of intercommerce.[19]

§ 170. Quarantine.

In the absence of Congressional legislation, a State may maintain reasonable quarantine, extending to the field of intercommerce.[20]

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[16]Pickard v. Pullman So. Car Co., 117 U. S. 34; S 6:635; L 29:785; Crutcher v. Kentucky, 141 U. S. 47; S 11:851; L 35:649; Allen v. Pullman Co., 191 U. S. 171; S 24:39; L 48:134; Western Un. Tel. Co. v. Kansas, 216 U. S. 1; S 30:190; L 54:355; Pullman Co. v. Kansas, 216 U. S. 56; S 30:232; L 54:378; Ludwig v. Western Un. Tel. Co., 216 U. S. 146; S 30: 280; L 54:423; International Textbook Co. v. Pigg, 217 U. S. 91; S 30:481; L 54:678; Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229; S 31:564; L 55:716; Buck Stove Co. v. Vickers, 226 U. S. 205; S 33:41; L 57:189.

[17]Lusk v. Kansas, 240 U. S. 236; S 36:263; L 60:621.

[18]Baltic Mining Co. v. Massachusetts, 231 U. S. 68; S 34:15; L 58:127.

[19]Steamship Co. v. Portwardens, 6 Wall. 31, 32-34; L 18:749 (such tax being viewed also as a tonnage-tax, and as void on that ground; case cited, pp. 34, 35).

[20]Kimmish v. Ball, 129 U. S. 217; S 9:277; L 32:695: State statute penalizing possession, within the State of Texas, of cattle not wintered north of the Southern boundary of Missouri and Kansas; and making every person liable in damage for allowing such cattle to run at large within the State, and for the spread, thereby the "Texas fever".

Rasmussen v. Idaho, 181 U. S. 198; S 20:594; L 45:820; State exclusion of sheep coming from any other State or any Territory in which sheep-scab was epidemic.

So, Smith v. St. Louis & Southw. Ry., 181 U. S. 248; S 21:603; L 45:847; Compagnie Francaise v. Board of Health, 186 U. S. 380;

Even where Congress has dealt with some portion of the field of quarantine, the presumption of Congressional intent of exclusion of State competency from the remainder of the field, is comparatively weak, or is absent.[21]

§ 171. State Inspection Laws.[22]

Closely akin to the matter of State quarantine, is the field of State inspection with a view to safety, quality of goods, quality of service, and the like; and what has been said above as to quarantine, is applicable, mutatis mutandis, to State inspection laws.[23]

By way of incident to State inspection, a small fee may, by State law, be charged, fixed approximately by the cost of inspection: the question of proper amount of such fee being matter of Federal law.[24]

A fee transcending this limit, and distinctly intended for, and tending to, the raising of revenue, is not valid as an inspection fee, but represents taxation; and must stand or fall as taxation.[25]

S 22:811; L 46:1209. See Missouri, Ks. & Tex. Ry. v. Haber, 169 U. S. 613; S 18:488; L 42:878.

[21]Asbell v. Kansas, 209 U. S. 251; S 28:485; L 52:778. Morgan v. Louisiana, 118 U. S. 455; S 6:1114; L 30:237. In the latter case, an Act of Congress, textually capable of being viewed as intended to exclude State action, was construed as affirmatively recognizing and adopting (presently or prospectively) certain State action in the same field.

For an example of invalid State legislation, see Railroad v. Husen, 95 U. S. 465; L 24:527 (holding void a State statute forbidding the bringing of cattle into the State between March 1 and November 1, in each year, and not distinguishing between healthy and unhealthy cattle). See also Reid v. Colorado, 187 U. S. 137; S 23:92; L 47:108.

[22]For a review of Inspection laws, and for an elaborate summary of such laws, see Turner v. Maryland, 107 U. S. 38; S 2:44; L 27:370.

[23]Turner v. Maryland, cited above; Pittsburg etc. Coal Co. v. Louisiana, 156 U. S. 590; S 15:459; L 39:544; Patapsco Guano Co. v. North Carolina, 171 U. S. 345; S 18:862; L 43:191; Western Union Tel. Co. v. New Hope, 187 U. S. 419; S 23:204; L 47:240; (inspection of telegraph poles, from the standpoint of safety); Pabst Brewing Co. v. Crenshaw, 198 U. S. 17; S 25:552; L 49:925; Red "C" Oil Co. v. North Carolina, 222 U. S. 380; S 32:152; L 56:240; Standard Stock Food Co. v. Wright, 225 U. S. 504; S 32:784; L 56:1197; Savage v. Jones, 225 U. S. 501; S 32:715; L 56:1182.

[24]Cases cited above.

[25]Postal Tel. Cable Co. v. Taylor, 192 U. S. 64; S 24:208; L 48:342; Foote v. Maryland, 232 U. S. 494; S 34:377; L 58:698. See

The mere fact, however, that a minor degree of net revenue results, is not, in and of itself, fatal to the inspection character and to validity. The question is one of degree.[26]

Like other State law, in general, a State inspection law must, however, be free from discrimination against intercommerce.[27]

§ 172. Health Laws.—Public Policy, in General.

Within the general principle of State quarantine and inspection laws, are State laws dealing with health, and other matters of Public Policy. Thus, in the absence of Congressional action, a State may forbid, and may punish, delivery, within the State, for suprastate commerce, of unripe (and unfit) fruit;[28] may, as an Incident of enforcement of its game laws, exclude, (during the State's closed season) dead game coming from without the State;[29] may, for the protection of owners of branded range cattle, provide for State inspection and tagging of cattle-hides to be sent out of the State, with a small fee per hide; and may forbid the receiving, by railroads, of untagged hides, for transportation to points outside the State (the Federal Courts taking notice of the local range conditions);[30] may, within limits, enforce Sunday observance;[31] and may require qualification and license for locomotive engineers,

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Rosenberger v. Pacific Ex. Co., 241 U. S. 48; S 36:510; L 60:880.

[26]Phillips v. Mobile, 208 U. S. 472; S 28:370; L 52:578.

[27]Passenger Cases, 7 How. 283; L 12:702; Henderson v. New York, 92 U. S. 259; L 23:543; (apparently overruling New York v. Miln, 11 Pet. 102); L 9:648; Minnesota v. Barber, 136 U. S. 313; S 10:862; L 34:455; (holding void a State requirement of inspection to be made within the State before slaughter); Brimmer v. Rebman, 138 U. S. 78; S 11:213; L 34:862; (holding void a certain State meat-inspection statute, discriminating against cattle slaughtered more than one hundred miles from the place of the sale of the meat, and thereby tending to exclusion from the State, of extra-State meat).

[28]Sligh v. Kirkwood, 237 U. S. 52; S 35:501; L 59:835.

[29]See Silz v. Hesterburg, 211 U. S. 31; S 29:10; L 53:75.

[30]McLean v. Denver & Rio Grande R. R., 203 U. S. 38; S 27:1; L 51:78, (dealing with legislation of a Territory, but broadly applicable, Federal areas having no extra-areal Commerce power). See Stoutenburgh v. Hennick, 129 U. S. 141, 149; S 9:256; L 32:637.

[31]Hennington v. Georgia, 163 U. S. 299; S 16:1086; L 41:166 (a State Sunday law held operative in respect of interstate freight trains).

generally,[32] or for automobiles;[33] and may tax (and thereby practically inhibit) the use, within the State, of trading-stamps and the like in intrastate sales of goods, even where suprastate features are involved;[34] or may, under like conditions, prescribe net weights, or the like, of food sold in containers.[35]

Such State power does not, in the absence of Congressional permission, extend to intoxicating liquors coming from without the State.[36]

§ 173. Ferries.

1. Purely and solely from the standpoint of movement and transportation, interferriage is within the general Federal power over intercommerce.[37]

2. Pursuant, however, to a Common Law conception, and to Common Law usage and practice, an exclusive right of maintenance of a ferry from and to a certain parcel of riparian land within a State, may exist as an easement appurtenant to such parcel.[38]

In so far, and where such situation exists, there enters in the question of State Sovereignty over such easement in its character of land. Thus, a State in question may protect such easement, at least on outward trips, as far as to

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[32]Smith v. Alabama, 124 U. S. 465; S 8:564; L 31:508. See Equal Protection of the Laws.

[33]Hendrick v. Maryland, 235 U. S. 610; S 35:140; L 59:385 (fee based upon cost of road maintenance).

[34]Rast v. Van Deman & Lewis, 240 U. S. 342; S 36:370; L 60:679; Tanner v. Little, 240 U. S. 369; S 36:379; L 60:691; Pitney v. Washington, 240 U. S. 387; S 36:385; L 60:703.

[35]Armour & Co. v. North Dakota, 240 U. S. 510; S 36:440; L 60:771.

[36]Bowman v. Chicago & Northw. Ry., 125 U. S. 465; S 8:689; L 31:700.

As to Congressional concession, in this particular field, see Wilson Act and Webb Act (§ 405).

[37]Fanning v. Gregoire, 16 How. 524; L 14:1043; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; S 5:826; L 29:158; St. Clair County v. Interstate Transfer Co., 192 U. S. 454; S 24:300; L 48:518; New York Centr. R. R. v. Hudson County, 227 U. S. 248; S 33:269; L 57:499; Sault Ste. Marie v. International Transit Co., 234 U. S. 333; S 34:826; L 58:1337.

[38]Conway v. Taylor's Ex'or, 1 Bl. 603; L 17:191.

the outer line (in the water) of the State,[39] and, in particular, may fix rates for the outward passage.[40]

§ 174. Mere Ultimate Intended Use, As not Definitory of Intercommerce.

The mere fact that goods being transported are to be used, after termination of the transit, outside the State of origin of transit, does not give intercommerce character to the transit; as, in the case of coal.[41]

§ 175. State Action in Furtherance of Suprastate Commerce.

Pursuant to a general principle considered elsewhere,[42] the Federal Exclusiveness does not (in the absence of Congressional action to the contrary) extend to inhibition of State action distinctly not limitative of, but promotive of, or in furtherance of, suprastate Commerce: as, in the matter of State improvement of a navigable river within the State, with requirement of public survey, measurement, and scaling of logs running out of booms, with a reasonable charge, and a lien therefor;[43] or State requirement, with penalty, of compliance with Federal law; as of compliance with Federal Organic requirement of equality, in railroad switching-service;[44] or of performance of a Common Law duty: as, that of prompt forwarding or delivery of telegrams,[45] or of freight;[46] or of furnishing freight cars, after

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[39]Conway v. Taylor's Ex'or, cited above.

[40]Port Richmond Ferry v. Hudson County, 234 U. S. 317; S 34: 821; L 58: 1330.

[41]Delaware, L. & W. R. R. v. Yurkonis, 238 U. S. 439; S 35: 902; L 59: 1397.

[42]§ 123.

[43]Lindsay & Phelps Co. v. Mullen, 176 U. S. 126; S 20: 325; L 44: 400. See Improvement of Navigable Streams.

[44]Missouri Pac. Ry. v. Larabee Mills, 211 U. S. 612; S 29: 214; L 53: 352.

[45]Western Un. Tel. Co. v. James, 162 U. S. 650; S 16: 934; L 40: 1105; Western Un. Tel. Co. v. Wilson, 213 U. S. 52; S 29: 403; L 53: 693; Western Un. Tel. Co. v. Milling Co., 218 U. S. 406; S 31: 59; L 54: 1088; Western Un. Tel. Co. v. Crovo, 220 U. S. 364; S 31: 399; L 55: 498.

(In Western Un. Tel. Co. v. Pendleton, 122 U. S. 347; S 7: 1126; L 30: 1187, the place of address was without the State in question, and the State had, thereby, no power).

[46]Atlantic Coast Line v. Mazursky, 216 U. S. 122; S 30: 378; L 54: 411.

a reasonable time, on request;[47] or of prompt settlement of claims for loss or damage to goods while in a carrier's possession within the State;[48] or of interchange of freight.[49]

§ 176. Indirect, Non-Discriminatory State Dealings with Intercommerce, in the absence of Congressional Action.

In the exercise of the ordinary functions of State government, a State may, in a considerable degree, deal (in the absence of Congressional action) with Intercommerce, provided that it does not single out Intercommerce as a subject for action, and thus discriminate against it.[50]

In such a situation, and subject to such qualifications, a State may, for example, make an Extension[51] of the Common Law of Tort, with operation upon suprastate, as well as upon intrastate, Commerce.[52]

§ 177. Severability of Traffic.

Traffic, within, and limited to, a single State, but carried on by carriers engaged primarily in intertraffic, may, in the view of the Federal law, be separable; and may, thereby (in the absence of Congressional intervention), be within State control.[53]

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[47]Illinois Centr. R. R. v. Mulberry Coal Co., 238. U. S. 275; S 35: 760; L 59:1306.

[48]Atlantic Coast Line v. Mazursky, cited above; Missouri, Ks. & Tex. Ry. v. Harris, 234 U. S. 412; S 34:790; L 58:1377. As to the situation after action by Congress, see Charleston, etc. R. R. v. Varnville Co., 237 U. S. 597; S 35:715; L 59:1137.

[49]Michigan Centr. R. R. v. Michigan R. R. Comm., 236 U. S. 615; S 35:426; L 59:750.

[50]Standard Oil Co. v. Tennessee, 217 U. S. 413; S 30:543; L 54; 817.

[51]See Extension (§§ 554-556).

[52]Martin v. West, 222 U. S. 191; S 32:42; L 56:159.

For examples of State legislation discriminatory against suprastate Commerce, and on that ground, void, see: Ward v. Maryland, 12 Wall. 418; L 20:260; Welton v. Missouri, 91 U. S. 275; L 23: 347; Guy v. Baltimore, 100 U. S. 434; L 25:743; Moran v. New Orleans, 112 U. S. 69; S 5:38; L 28: 653; Harman v. Chicago, 147 U. S. 396; S 13:306; L 37:216; Darnell & Son v. Memphis, 208 U. S. 113; S 28: 247; L 52:413.

[53]Thus, by the laws of a certain State, Pullman cars were not obliged to receive passengers for transit between two points both within the State, but were at liberty to do so. The actual and the relative amount and value of such traffic was small, and was not

The same principle has been applied to express corporations,[54] and to telegraph corporations.[55]

So, a State may sever the intra-State from the extra-State portion of gross railroad receipts, composed in part of intercommerce receipts, and tax the former.[56]

So, of a State order for the running of a train to the State line.[57]

§ 178. Persons and Things In, but not As In, Intertransit.

The mere fact that a person or thing is, at a given moment, in course of intertransit, does not qualify the authority of a State over it in fields of action not dealing with the transit as such.

Thus, chattels having situs in a certain State, are not removed from the general taxing power of the State, merely by being in the course of, or engaged in, intertransit, at the time of the laying of the tax.[58]

So, where corporeal chattels have come into a State by intertransit, but the transit is as yet not at an end, in law, by reason of the goods being still in an original package, sale of such goods, at such point of rest, with delivery within the state, is within the scope of a general State sale tax, not discriminating against goods of intercommerce origin.[59]

So, in the absence of Congressional action, the Federal Organic law recognizes in the States, severally, a power of

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essential to maintenance of intertransit service of such cars. In this situation, acceptance of such passengers was viewed as acceptance of a State privilege, and, as such, as bringing the corporation within the State power of taxation upon receipts from such (intrastate) traffic. Pullman Co. v. Adams, 189 U. S. 420; S 23:494; L 47:877; Allen v. Pullman Co., 191 U. S. 171; S 24:39; L 48:134.

[54]Osborne v. Florida, 164 U. S. 650; S 17: 214; L 41:586.

[55]Postal Telegr. Cable Co. v. Charleston, 153 U. S. 692; S 14:1094; L 38:871.

[56]Maine v. Grand Trunk Ry., 142 U. S. 217; S 12:121; L 35:994.

[57]Missouri Pac. Ry. v. Kansas, 216 U. S. 262; S 30:330; L 54:472.

[58]Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; S 2:257; L 27:419; Coe v. Errol, 116 U. S. 517; S 6:475; L 29:715; Diamond Match Co. v. Ontonagon, 188 U. S. 82; S 23:266; L 47:394.

[59]Woodruff v. Parham, 8 Wall. 123; L 19:382. So of a State tax per gallon on spirituous liquors, under like circumstances. Hinson v. Lott, 8 Wall. 148; L 19:387.

Extension[60] or of modification (without discrimination against suprastate Commerce) of the Common Law principles of classification:[61] as, in classification of passengers, from the standpoint of relation between carrier and passenger.

Thus, a State may provide that certain (reasonably fixed) exceptional classes of passengers shall be subject, in respect of liability for negligence, to the same rules as employees of the railroad.[62]

So, a general State attachment or garnishee law, applicable to chattels or credits in general, is (in the absence of Congressional intervention) operative upon railroad rolling-stock engaged in intertransit; and upon credits arising from, and in the course of, such transit.[63]

In their aspect, however, of being in such course of transit, such persons and things are (in the absence of affirmative Congressional concession) not within the sphere of State authority.[64]

§ 179. Occupation, as Such.[65]

Where, and in so far as, the States severally lack power of dealing with a given class of action, as such, they cannot, pro tanto, deal therewith by indirection, in the form of dealing with the occupation, as such, of carrying on (in

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[60]See Extension (§§ 554-556).

[61]See Equal Protection of the Laws (§§ 497-499).

[62]Martin v. Pittsburg etc. R. R., 203 U. S. 284; S 27: 100; L 51: 184.

[63]Davis v. Cleveland, Cinn. etc. Ry., 217 U. S. 157; S 30: 463; L 54: 708.

[64]1. Persons.—Passenger Cases, 7 How. 283; L 12: 702; Crandall v. Nevada, 6 Wall. 35; L 18: 745; Henderson v. New York, 92 U. S. 259; L 23: 543; Chy Lung v. Freeman, 92 U. S. 275; L 23: 550; Hall v. De Cuir, 95 U. S. 485; L 24: 547; People v. Compagnie Gén. Transatlantique, 107 U. S. 59; S 2: 87; L 27: 383; Louisville, N. O. & Tex. Ry., v. Mississippi, 133 U. S. 587; S 10: 348; L 33: 784; Chiles v. Chesapeake & O. Ry., 218 U. S. 71; S 30: 667; L 54: 936.

2. Things.—Foster v. Master & Wardens, 94 U. S. 246; L 24: 122 (invalidity of a State statute providing for exclusive examination, by port-wardens, into the condition of goods arriving by sea at a State port from without the State).

[65]As to occupation existing not merely as such, but peculiarly differentiated, (as, by the possession of a right-of-way railroad franchise, or of an incorporeal hereditament of ferry-right), see more specific sections of this Chapter.

whole or in part) such class of action,—the Federal law looking to Substance, not to Form.[66]

§ 180. No State Taxation of Intercommerce, as Such.

It follows from what has been said above, that a State may not tax intercommerce as such, directly or indirectly.[67]

§ 181. Incidents.

The Federal suprastate Commerce power extends, in the discretion of Congress, to all necessary or convenient Incidents: as, to the accounts, in respect even of intrastate traffic, of a carrier engaged also in suprastate traffic;[68] to requirements in respect of rolling-stock employed partly in intertransit; of safety-appliances; and of use thereof even in intrastate transit;[69] but not, for example, to such work as that of putting up of fixtures in a railroad machine-shop occupied in work indifferently upon rolling-stock used in, and rolling-stock not used in, suprastate transit.[70]

§ 182. Classification of Passengers by Race or Color (in Suprastate Transit).

1. Mere classification of persons, by race or color, not being, in and of itself, violative of Equal Protection of the laws,[71] Congress has, in the field of suprastate Commerce, power of such classification.[72]

2. A State has no power, to this effect, in suprastate Commerce, but the matter is of Exclusive Congressional competency.[73]

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[66] See cases, generally, cited in this group of Chapters. In many of those cases, the matter there primarily in question was dealt with through, or from the standpoint of, occupation.

[67] State Freight Tax, 15 Wall. 232; L 21:146; Norfolk & Western R. R. v. Pennsylvania, 136 U. S. 114; S 10:958; L 34:394; many later cases.

[68] Interstate Com. Comm. v. Goodrich Transit Co., 224 U. S. 194; S 32:436; L 56:729.

[69] Southern Ry. v. United States, 222 U. S. 20; S 32:2; L 56:72. Southern Ry. v. Indiana R. R. Comm., 236 U. S. 439; S 35:304; L 59:661.

[70] Shanks v. Delaware, L. & W. R. R., 239 U. S. 556; S 36:188; L 60:436. See, also, succeeding Chapters and cases there cited.

[71] See Equal Protection of the Laws (§§ 497-499).

[72] Ubi supra.

[73] Hall v. DeCuir, 95 U. S. 485; L 24:547; (incompetency of a State to forbid classification by race or color, by carriers, in suprastate Commerce).

3. Congress, if not having taken affirmative action in this field, leaves the matter to be governed by the Common Law principles governing common carriers;—that is to say, leaves carriers free, in suprastate transit, to make such classification or not, at their pleasure.[74]

[74]Chiles v. Chesapeake & O. Ry., 218 U. S. 71; S 30: 667; L 54: 936.

CHAPTER XXXIII.

THE SAME GENERAL SUBJECT CONTINUED:—(b) LAND HIGHWAYS OF THE DIFFERENT CLASSES.

§ 183. Prefatory.

The various present forms and aspects of highways have all been developed from early simple forms, with mere specialization and adaptation of principles applicable to the early forms.[1]

§ 184. Ordinary Highways.

By force of the Federal principles of Privileges and Immunities,[2] and of the principle of accrual to the Federal Sovereignty, of State-created property or privilege,[3] ordinary highways, existing by force of State law (a) are, as matter of Federal Organic law, open to suprastate Commerce use, to the same extent and in the same manner as to intrastate use; and (b) are, pro tanto, within the field of Federal power.[4]

§ 185. Street Railroads.

Rails laid pursuant to State law in an ordinary highway, or in an ordinary turnpike, are, in law, nothing but a particular form of surfacing of the road-way. The gauge, the weight of rails, the matter of single or double track, the location of sidings, and other such features, stand upon the same footing as paving, macadamizing or other particulars of ordinary surface, and, like features of the latter class, are within the scope of State Sovereignty, apart from the feature of suprastate Commerce.

§ 186. Right-of-Way Railroads.

A railroad (whatever be the form of propulsion) built under State-granted exercise of right of Eminent Domain, with a right-of-way roadway of its own, is a highway, but

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[1]See Lake Superior etc. R. R. v. United States, 93 U. S. 442, 446 et seq.; L 23: 965; Atchison, T. & S. F. R. R. v. Denver & N. O. R. R., 110 U. S. 667, 676; S 4:185; L 28:291.

[2]§§ 293, 294. [3]§§ 101, 102.

[4]Cases generally cited in the present Chapter, and in the preceding and following Commerce Chapters.

of limited and exclusive character. It is, mutatis mutandis, subject to principles governing ordinary highways.[5]

§ 187. Local Co-Existence of Such Different Types.

Differentiation, as among different types (above considered) of highway, is, in practice, seldom or never complete. In practice, for example, highways of different types (as, a carriage-road and a railroad) constantly intersect each other, at grade; and, at points of intersection at grade, there is a co-existence, in one and the same space of ground, of different types. In respect of such a space of intersection, a State in question has competency to deal with the situation, not only (a) from the standpoint of the several types viewed separately, but (b) from the standpoint of their co-existence. State capacity, thus existing, extends not merely to particulars of construction (as, planking between rails, warning-posts and gates) but to particulars of regulation: as, of whistling for crossings, slowing-down for crossings, and the like.[6]

§ 188. Physical Inter-relation of Railroads.

Just as a State has control over the location, in general, of right-of-way railroads existing under State law, so a State has control of physical connection between different such railroads, and with relation to intertraffic. Thus, a State may order physical switching connections between two such railroads at a point where they approximate each other.[7]

§ 189. Stopping-Places.

A proper provision for intermediate stopping-places, for street-cars or for railroad trains, is (like the fixing of termini) an essential element of the establishment of rails in highways, or of right-of-way railroads; and the matter of fixing such stopping-places is, in the absence of discrimina-

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[5]Thus, a State may provide in respect of safeguards for existing railroad bridges, just as it may at the outset prescribe particulars of construction of such bridges. New York, N. H. & H. R. R. v. New York, 165 U. S. 628; S 17:418; L 41:853.

[6]Southern Ry. v. King, 217 U. S. 524; S 30:594; L 54:868.

[7]Grand Trunk Ry. v. Michigan Ry. Comm., 231 U. S. 457; S 34:152; L 58:310; Wisconsin, etc., R. R. v. Jacobson, 179 U. S. 287; S 21:115; L 45:194.

tion against intercommerce, within the scope of State authority and is on the same footing as the fixing of termini.[8]

§ 190. Rolling-Stock, Generally.

An early conception of right-of-way railroads was: that the corporation should provide only motive-power, (engines), and that cars should be provided by individual users of the road.[9]

Under such a scheme, the engines,—while individually, in and of themselves, chattels,—would, while in use, savor of the realty, like trade-fixtures; and would be, pro tanto, within principles applicable to the real-estate plant. The scheme proved to be impracticable, as a general scheme, and gave way, in general, to the plan of ownership (and of provision) by the railroad corporation, of cars, as well as of engines. In this situation, what has been said immediately above as to engines, became applicable to such other rolling-stock.

The result is that such rolling-stock falls within the principles (considered in the earlier paragraphs of the present section) applicable to the real estate plant.[10]

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[8]Gladson v. Minnesota, 166 U. S. 427; S 17:627; L 41:1064; Lake Shore etc. Ry. v. Ohio, 173 U. S. 285; S 19: 465; L 43:702.

For instances of unreasonable or discriminatory (and thereby invalid) State action, in this field, see Illinois Centr. R. R. v. Illinois, 163 U. S. 142; S 16:1096; L 41:107; Cleveland, Cinn., etc. Ry. v. Illinois, 177 U. S. 514; S 20:722; L 44:868; Mississippi R. R. Comm. v. Illinois Centr. R. R., 203 U. S. 335; S 27:90; L 51:209; Atlantic Coast Line v. Wharton, 207 U. S. 328; S 28:121; L 52:230; Chicago, B. & Q. R. R. v. Wisconsin R. R. Comm., 237 U. S. 220; S 35:560; L 59:926.

[9]See Lake Superior etc. R. R. v. United States, 93 U. S. 442, 446 et seq.; L 23:965; Atchison, T. & S. F. R. R. v. Denver & N. O. R. R., 110 U. S. 667; S 4:185; L 28:291, both cited above.

[10]New York, N. H. & H. R. R. v. New York, 165 U. S. 628; S 17:418; L 41:853 (State power of regulation of the heating of passenger-cars); Chicago, Rock Island & Pac. Ry. v. Arkansas, 219 U. S. 453; S 31:275; L 55:290 (valid State requirement, with a view to safety, of a specific number of brakemen).

For instance of arbitrary and unreasonable (and thereby void) State requirement of furnishing freight-cars, see Houston etc. R. R. v. Mayes, 201 U. S. 321; S 26: 491; L 50:772; St. Louis Southw. Ry. v. Arkansas, 217 U. S. 136; S 30:476; L 54:698.

§ 191. Inter-Use of Railroad Beds and Tracks.

A State may, in the absence of Congressional action, order inter-use, by different right-of-way railroad corporations, of each other's beds and trackage, generally, including intertraffic.[11]

§ 192. Time-Schedules.

In the absence of Congressional action, a State may fix time-schedules, not only with a view to intrastate service, but with a view to intertransit: as, with a view to connection between points within the State, on interstate trains.[12]

§ 193. Wires, Poles, Conduits, etc., in Highways of Any One of the Several Types.

The establishment, maintenance, and use, in a highway, (of any of the types above considered), of telegraph or telephone poles, wire-conduits, or the like, is a mere detail of establishment of construction, or of use, of such highways; and what has been said above of rails, their use, and their incidents, is applicable to such poles, conduits, wires, and the like.[13]

§ 194. Wharves.

A wharf, as such, is not a highway; and the mere fact of use of a wharf, by the owner (a carrier) in intertraffic, does not constitute it a highway.[14]

A wharf may, however, by use voluntarily made of it, by the owner, become, and be, a highway; and may, thereby, and pro tanto, come, and be, within the Federal Intercommerce power.[15]

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[11]Grand Trunk Ry. v. Michigan Ry. Comm., 231 U. S. 457; S 34: 152; L 58: 310.

[12]Atlantic Coast Line v. North Carolina Corp'n Comm., 206 U. S. 1; S 27: 585; L 51: 933.

[13]Thus, a State may impose a penalty for non-performance of a telegraph company's Common Law duty in respect of telegrams generally, including intertransit telegrams. Western Un. Tel. Co. v. James, 162 U. S. 650; S 16: 934; L 40: 1105; Western Un. Tel. Co. v. Milling Co., 218 U. S. 406; S 31: 59; L 54: 1088; Western Un. Tel. Co. v. Crovo, 220 U. S. 364; S 31: 399; L 55: 498.

[14]Louisville & Nashv. R. R. v. West Coast Co., 198 U. S. 483; S 25: 745; L 49: 1135. See Weems Stmbt. Co. v. People's Stmbt. Co., 214 U. S. 345; S 29: 661; L 53. 1024.

[15]Southern Pac. Terminal Co. v. Interstate Com. Comm., 219 U. S. 498; S 31: 279; L 55: 310.

§ 195. Discontinuance.

The Federal Sovereignty extends not merely to use, but to continuance of existence, of a highway. Thus, where a State has authorized the building of a railroad bridge, and the bridge has become a link in intertransit, the power, (otherwise existing), of the State, to order removal of the bridge, as matter of State public policy, (as, for a drainage scheme), has come to an end,—the question of continuance of the bridge having now accrued to the field of Federal Sovereignty, as matter of intercommerce.[16]

§ 196. Canals.

In the Common Law sense of the term "land", a canal is land; and what has been said in earlier sections is plainly applicable, distributively, to canals and to carriers or others as users of canals.[17]

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[16]Kansas Southern Ry. v. Kaw Valley Dist., 233 U. S. 75; S 34: 564; L 58: 857.

[17]As to canals as Admiralty waters, see Admiralty Waters.

CHAPTER XXXIV.

THE SAME GENERAL SUBJECT CONTINUED:—(c) COMMON CARRIERS AS SUCH.

§ 197. The General Principle.

Common carriers, as a class, engaged in (and as engaged in) intercommerce, act under Federal right, and are free from State exclusion or material State control. Thus, a State requirement, upon carriers, as a class, of a license or bond, or the like, is not operative in respect of an inter-transit portion of a carrier's business.[1]

So of rates.[2]

Minor State regulation is, however, in the absence of Congressional action, permissible: as, in requirement of posting of rates, including intercommerce rates.[3]

§ 198. No Imposition, upon Carriers, of Extra-State Duties.

Whatever may be the power of a State in respect of intra-State duties in intertraffic, it is not competent to a State to prescribe the duties of the carrier in respect of matters outside the State: as, by imposition, upon an initial carrier, of a duty of tracing freight lost outside the State, and of giving information to the shipper as to the matter,[4] or a duty of personal delivery out of the State (or out of the State area proper) of a telegram received at an office within the State.[5]

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[1]Bowman v. Chicago & Northw. Ry., 125 U. S. 465; S 8:689; L 31:700; Crutcher v. Kentucky, 141 U. S. 47; S 11:851; L 35:649; Adams Ex. Co. v. New York, 232 U. S. 14; S 34:203; L 58:483.

[2]Wabash etc. Ry. v. Illinois, 118 U. S. 557; S 7:4; L 30:244; Louisville & Nashv. R. R. v. Eubank, 184 U. S. 27; S 22:277; L 46:416; Hanley v. Kansas City So. Ry., 187 U. S. 617; S 23:214; L 47:333.

[3]Railroad v. Fuller, 17 Wall. 560; L 21:710.

[4]Central of Georgia Ry. v. Murphey, 196 U. S. 194; S 25:218; L 49:444.

[5]Western Un. Tel. Co. v. Pendleton, 122 U. S. 347; S 7:1126; L 30:1187; Western Un. Tel. Co. v. Brown, 234 U. S. 542; S 34:955; L 58:1457; (the latter a case of delivery in a Federal area within the State).

§ 199. Limitation of Carriers' Liability, Apart from Federal Legislation.

1. In the Absence of State Statute.—In the absence of State statute, as well as of Congressional action, the question of liability of carriers, in intercommerce traffic, was originally dealt with by the Federal law in two distinct and separate ways. (1) In the Federal Courts, it was dealt with by the standards and doctrines of the Common Law as Federally understood;[6] (2) in the State Judicial Jurisdictions, it was permitted by the Federal law to be dealt with (and was dealt with) by the standards and doctrines of the Common Law as understood by the States severally.[7]

The field was, therefore, one of those in which, in respect of a given transaction, two different views of law might (and, in practice, in considerable measure, did) exist concurrently: the application of the one or of the other view depending upon the accident of Federal, or of State, Original jurisdiction of a particular cause.[8]

2. As Matter of Affirmative State Legislation.—In the absence of Congressional action, it would seem to have been competent to the States severally, (without discrimination against intercommerce), to deal with this field by statute, as well as by Unwritten State law.[9]

3. State Inhibition of Action by Carriers, in This Field.—In the absence of Congressional action, a State may, by statute, inhibit the making, within the State, of a contract of limitation of liability of a telegraph corpora-

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[6]§§ 681-684; 688-697; and cases cited. [7]Ubi supra.

[8]Pennsylvania R. R. v. Hughes, 191 U. S. 477; S 24: 132; L 48: 268; (taken in connection with Hart v. Pennsylvania R. R., 112 U. S. 331; S 5:151; L 28:717).

[9]See Chicago, Milw. & St. P. Ry. v. Solan, 169 U. S. 133; S 18: 289; L 42:688; Richmond etc. R. R. v. Patterson Tobacco Co., 169 U. S. 311; S 18: 335; L 42:759; Baltimore & O. Southw. Ry. v. Voight, 176 U. S. 498; S 20:385; L 44:560; Western Un. Tel. Co. v. Call Pub'g Co., 181 U. S. 92; S 21:561; L 45:756; Atlantic Coast Line v. Mazursky, 216 U. S. 122; S 30:378; L 54:411; Adams Ex. Co. v. Croninger, 226 U. S. 491, at p. 500; S 33:148; L 57:314: "But it is equally" * * *; Missouri, Ks. & Tex. Ry. v. Harris, 234 U. S. 412; S 34:790; L 58:1377.

tion, even in respect of telegrams to points without the State, and lost without the State.[10]

§ 200. State Power of Conclusive Presumption of Damage to Goods, by Final Carrier.

In view of the difficulty (and often the impossibility) of locating, as among connecting carriers, damage to goods, it is competent to a State (in the absence of action by Congress) to provide that if a carrier voluntarily receives, within the State, for delivery therein, goods from a connecting prior carrier, outside the State, the receiving carrier shall be liable for damage appearing upon delivery;[11] such statutory provision merely amounting to an absolute requirement upon such final carrier of non-acceptance from the prior carrier, of damaged goods, as and for goods not then in damaged condition.[12]

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[10]Western Un. Tel. Co. v. Milling Co., 218 U. S. 406; S 31:59; L 54:1088.

[11]Atlantic Coast Line v. Glenn, 239 U. S. 388; S 36:154; L 60:344.

[12]We may here observe that Congress, having power over a suprastate transit, from beginning to end, imposes, upon the initial carrier, liability for loss or damage occurring at any stage of a through transit, leaving the question of fault, as among successive carriers, to be settled by them, inter se. New York & Norf. R. R. v. Peninsula Exchange, 240 U. S. 34; S 36:230; L 60:511. Such Congressionally-imposed absolute liability upon the initial carrier, as between him and shipper or consignee, is not inconsistent with State-imposed absolute liability, as between the final carrier and shipper or consignee (Atlantic Coast Line v. Glenn, cited above), rights of successive carriers inter se not being affected by either the Federal or the State, legislation.

As to conclusive presumption, generally, based upon consideration of impracticability of actual ascertainment of facts, etc., see Evidential Crimes (§ 519).

CHAPTER XXXV.

THE SAME GENERAL SUBJECT CONTINUED:—(d) DEFINITION OF INTERTRANSIT.

§ 201. Direction and Course of Intertransit.

The direction and particular course of a physical intertransit is immaterial. The transit may be from or into, the State in question; or it may enter, and pass across and beyond such State, and thereby be tri-areal or multi-areal.[1]

§ 202. Subjects of Intertransit.

From the standpoint of Intertransit, the Federal law of Intercommerce includes persons,[2] as well as things corporeal (as, freight and express parcels), and things incorporeal, capable of transmission: (as, telegraphic messages,[3] or information or instruction).[4]

§ 203. Slight, Incidental Departure from a State.

Mere slight, incidental and unimportant detours from the area proper of a single State are viewed—whether in favor of, or as against, those concerned in the journey—as not giving to the journey the character of intertransit: as, in the case of mere tackings of a sailing-vessel into Canadian waters, in a Lake voyage between two Lake ports in Michigan,[5] or into extra-State Ocean waters.[6]

So, where a railroad corporation of a certain State had its road-bed almost wholly within the home State, but, sole-

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[1]Fargo v. Michigan, 121 U. S. 230; S 7:857; L 30:888.

[2]Crandall v. Nevada, 6 Wall. 35; L 18:745; Head Money Cases, 112 U. S. 580; S 5:247; L 28:798; Hoke v. United States, 227 U. S. 308; S 33:281; L 57:523; Athanasaw v. United States, 227 U. S. 326; S 33:285; L 57:528; Bennett v. United States, 227 U. S. 333; S 33:288; L 57:53.

[3]Various cases cited in the present Part.

[4]International Text-book Co. v. Pigg, 217 U. S. 91; S 30:481; L 54:678; (correspondence-school instruction).

[5]Cincinnati Packet Co. v. Bay, 200 U. S. 179; S 26:208; L 50:428 (the Sherman Act held inapplicable to such situation on the ground that traffic by such route would be mere intrastate traffic).

[6]Wilmington Transp'n Co. v. California R. R. Comm., 236 U. S. 151; S 35:276; L 59:508.

ly for the avoidance of an engineering difficulty, made a slight detour into an adjoining State, with a corresponding detour of traffic, the detour was, in respect of traffic, viewed as negligible; and through-traffic over the detour, between two points in the home State, was intrastate traffic, notwithstanding the physical detour.[7]

The matter of absolute length of time would seem to be not necessarily material. In the case, for example, of logs, cut in one State, and in the course of transit through a second State, a holding for a considerable part of a year, awaiting Spring freshets, for moving down a river, was viewed, obiter, by the Supreme Court, (following the State Court's view) as not material.[8]

So, mere temporary absence from his employment, on the part of a railroad employee, does not necessarily defeat, as against him, interstate character of his service, as of a whole journey.[9]

§ 204. Incidental Interruptions.

Continuity and Intertransit character are not, in legal contemplation, destroyed by mere incidental or casual physical interruptions of a journey, as, for necessary repairs to a carrier's vehicles;[10] for grazing, in the case of a herd or flock of animals being driven across a State, in a manner

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[7]Lehigh Valley R. R. v. Pennsylvania, 145 U. S. 192; S 12: 806; L 36: 672; (through transportation, on such route, being held within the taxing power of the home State, as intrastate transportation). So, Ewing v. Leavenworth, 226 U. S. 464; S 33: 157; L 57: 303.

Reference may be made here, also, to the case of an interruption to the actual movement of goods in the case of a holding of them by a carrier awaiting payment before delivery, of C. O. D. charges. See, below, Termination of Transit. (§ 209).

[8]Coe v. Errol, 116 U. S. 517: S 6: 475; L 29: 715. See so much of the statement of facts, and of the State Court's judgment, as refers to the logs cut in Maine; and so much of the Opinion as refers to those logs (p. 525: "This question does not * * * protection of the Constitution"). (As to the actual decision in Coe v. Errol, see citation of the case elsewhere, to another point).

[9]North Carolina R. R. v. Zachary, 232 U. S. 248; S 34: 305; L 58: 591.

[10]Delk v. St. Louis etc. R. R., 220 U. S. 580; S 31: 617; L 55: 590; Great Northern Ry. v. Otos, 239 U. S. 349; S 36: 124; L 60: 322.

common in the region;[11] or for transfer by one carrier to another, in through transportation.[12]

So, of a stop of a dining-car, awaiting its next ensuing attachment to a train;[13] of the stoppage of a freight-train, in a railroad yard, for breaking it up and making new trains,[14] and of change from a defective, to a sound, freight-car.[15]

§ 205. Incidents of Actual Intertransit.

Like other specific matters, in general, Intertransit includes within its scope, such matters as are necessary or natural Incidents of actual transit.

Thus, a workman carrying bolts for the repair of a railroad bridge used for intertransit, may be viewed as engaged, thereby, in intertransit, and so in intercommerce.[16]

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[11]Kelley v. Rhoads, 188 U. S. 1; S 23:259; L 47:359.

[12]Texas & New Orleans R. R. v. Sabine Tram Co., 227 U. S. 111; S 33:229; L 57:442.

[13]Johnson v. Southern Pac. Co., 196 U. S. 1; S 25:158; L 49:363.

[14]St. Louis, San Fr. etc. Ry. v. Seale, 229 U. S. 156; S 33:651; L 57:1129.

[15]Atchison, T. & S. F. Ry. v. Harold, 241 U. S. 371; S 36: 665; L 60:544.

[16]Pedersen v. Delaware, L. & W. R. R., 229 U. S. 146; S 33:648; L 57:1125 (three Justices dissenting).

So, of a railroad yard-clerk, while engaged in taking the numbers of, and in sealing and marking, cars of a train, for the breaking-up of the train, and the making-up of new trains, some (although not all) of the cars being in intertransit, although, at the time, the cars are not in actual motion. St. Louis & San Francisco Ry. v. Seale, 229 U. S. 156; S 33:651; L 57:1129; Pecos & Northern Tex. Ry. v. Rosenbloom, 240 U. S. 439; S 36:390; L 60:730.

So, of switching (Illinois Centr. R. R. v. Louisiana R. R. Comm., 236 U. S. 157; S 35:275; L 59:517); and of cutting out intrastate cars from a train otherwise operating in intercommerce. Illinois Centr. R. R. v. Behrens, 233 U. S. 473; S 34:646; L 58:1051; New York Centr. R. R. v. Carr, 238 U. S. 260; S 35:780; L 59:1298.

So, of movement of rolling-stock, simply for repairs. Chicago, Rock Island & Pac. Ry. v. Wright, 239 U. S. 548; S 36:185; L 60:431.

Not, however, of such work as the putting-up of fixtures in a railroad machine-shop, occupied in working upon rolling-stock, some used in suprastate and some used only in intrastate, traffic (Shanks v. Delaware, L. & W. R. R., 239 U. S. 556; S 36:188; L 60:436); nor, generally, of contractors, and their agents and servants, as distinguished from employees. Chicago, Rock Island & Pac. Ry. v. Bond, 240 U. S. 449; S 36:403; L 60:735; Chicago, B. & Q. R. R. v. Harrington, 241 U. S. 177; S 36:517; L 60:941.

§ 206. Not Necessarily of Trade Character.

Intertransit is not necessarily of Trade character. Mere pleasure travel, for example, or transmission of gifts and non-commercial telegrams, are potential subjects of intertransit.

Movement of empty cars may be intertransit.[17]

§ 207. Beginning of Intertransit.

The question whether, in a given instance, intertransit has begun, may turn upon one or more of a variety of considerations: (a) of physical; (b) of contractual; or (c) of legal, character.

Delivery to a shipper, may be, and ordinarily is, a beginning of transit, although goods are to, and do, remain, for a reasonable period, in the carrier's hands, for transmission in the ordinary course of his business.[18]

§ 208. Continuity.

1. The General Principle.—To be intertransit, a journey—of a person or of a thing—must be continuous, and not a mere succession of separate and independent physical journeys. This principle may be presented in general terms in the statement that continuity is essential for intertransit. Thus, a theatrical or exhibition tour, with successive stops planned as a fundamental feature of the journey as a whole, would be a succession of transits, and not a single transit, at least for many purposes.[19]

2. Initial Intent.—It is essential to continuity in a journey—of a person or of a thing—that intertransit have been intended at the outset, by the traveller or the shipper. Thus,—to put a simple case—if one should take goods from one point in a certain State, to another point in the same State, with intent to sell them at the latter point; but failing to sell them there, should then and there determine to

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[17]North Carolina R. R. v. Zachary, 232 U. S. 248; S 34:305; L 58:591.

[18]Southern Pac. Terminal Co. v. Interstate Com. Comm., 219 U. S. 498; S 31:279; L 55:310; Pennsylvania R. R. v. Clark Coal Co., 238 U. S. 456; S 35:896; L 59:1406; (coal f. o. b. at the mine).

[19]Chicago, Milw. & St. Paul Ry. v. Iowa, 233 U. S. 334; S 34:592; L 58:988.

Mutual Film Corp. v. Ohio Industrial Comm., 236 U. S. 230; S 35:387; L 59:552 (moving-picture films subject to censorship in any State where unshipped for exhibition there).

take them, (and actually take them), to a point outside the State, the physical journey from the initial point to the final point would not be in law continuous, and would not be intertransit. The same thing would be true if, in the first stage of the actual journey, he had no definite intention as to what he would do with the goods upon arriving at the first stopping-place. In either case, he and the goods would (in the language of Intertransit), have "come to rest" at the first of the two stopping-points.[20]

It is not necessary that the initial intent be specific: that is, that it contemplate a particular course of ultimate transit. It is sufficient that intertransit in some form be intended. Thus,—to recur, with modifications, to a simple situation considered in the immediately preceding paragraph—if one take goods from a point within a certain State to another point within the State, for shipment thence to some point outside the State, leaving the selection of such other point to be determined at the first stopping-point (within the State) according to the condition of the market; and pursuant to the original plan, a shipment out of the State is made, the journey of the goods from the initial point to the extra-State point will (other essentials being present) be a unit, and intertransit.

This principle is illustrated in the familiar situation of massing of goods at a shipping-point within a State for

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[20]The latter situation (and, a fortiori, the former) is illustrated in American Steel & Wire Co. v. Speed, 192 U. S. 500. The owner of coal-mines in one State, brings coal, in his own vessels, to a port in another State. The journey thus far is of interstate character; and it, and the goods, pending the transit, are thereby within the scope of Federal and not State authority. If, however, the coal comes to rest at the such port, in the second State, and is held there, by the owner, for sale there, by the original boat-loads; and if the purchaser of a boat-load carries his purchase further, whether to a point within, or to a point without, the second State, such supplemental journey does not merge with the original journey, and form with it a unit of journey; but stands by itself,—being bi-areal or uni-areal according as it departs from the second State or not.

To the same effect are: Brown v. Houston, 114 U. S. 622; S 5: 1091; L 29:257; Pittsburg Coal Co. v. Bates, 156 U. S. 577; S 15: 415; L 39:538; General Oil Co. v. Crain, 209 U. S. 211; S 28:475; L 52:754.

(and followed by) sale and extra-State shipment thence, all in the ordinary and convenient course of business.[21]

3. CONTINUATION, BY VENDEE, OF AN ORIGINAL INTENT OF SHIPPER:—(CHANGE OF TITLE, EN ROUTE).—Intertransit character, having once attached to a transit of goods, by intertransit intent of the shipper, may be continued by a continuance of the intent on the part of a purchaser of the goods en route. That is to say,—mere change of title of goods en route, does not, in and of itself, defeat intertransit character of the journey.[22]

4. CONTINUITY IN METHODS, MEANS, AND DETAILS, NOT NECESSARY.—It is not essential to continuity-in-law that a passenger or a shipper follow one and the same method; or use one and the same instrumentality (or one and the same type of instrumentality), throughout the transit; or (if, or in so far as he avails himself of carriers), that there be a through-contract of carriage with successive carriers.[23]

What has just been said in respect of successive carriers, is obviously true of independent successive employment by a traveller or shipper of a single carrier.

5. CONTINUITY FROM THE STANDPOINT OF CARRIERS' OCCUPATION AND INSTRUMENTALITIES.—The mere fact that continuity, and intertransit character, in a journey, may exist in favor of, or as against travellers or shippers utilizing successive carriers independently, does not, from the standpoint of the carrier, his rights and duties, and his instru-

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[21]Bacon v. Illinois, 227 U. S. 504; S 33:712; L 57:615; Susquehanna Coal Co. v. South Amboy, 228 U. S. 665; S 33:299; L 57:1015; Southern Pac. Terminal Co. v. Interstate Com. Comm., 219 U. S. 498; S 31:279; L 55:310; (see, particularly, the summary of facts, p. 525, last paragraph).

[22]Gulf, Colorado & S. F. Ry. v. Texas, 204 U. S. 403, 412; S 27:360; L 51:540; Atchison, T. & S. F. Ry. v. Harold, 241 U. S. 371; S 36:665; L 60:1050.

[23]Thus, where one carrier was employed (under a contract with it alone) to transport logs and stones from an inland point within a certain State, to a seaport in that State (and no further) pursuant to an original intent (ultimately carried out) of the shipper to export them, by a maritime carrier, to a foreign country, the journey from the inland point, out of the State was a unit, and was intertransit, notwithstanding the break in the carrier employments.

Louisiana R. R. Comm. v. Texas & Pac. Ry., 229 U. S. 336. S 33:837; L 57:1215. See Atchison, T. & S. F. Ry. v. Harold, 241 U. S. 371, cited above.

mentalities, give intertransit character to the carrier's action.

Thus, where a shipper of freight from one State into another, billed and shipped it by one certain railroad carrier, to its terminus in the second State, and thence, by another (connecting) railroad, under a new bill of lading, to the final point (in the second State), the latter journey—although in the original car—did not, as between the shipper and the second carrier, merge with the earlier journey, but was separate and distinct from it, and was an intrastate journey.[24]

What has been said in respect of successive independent carriers is, by parity of reasoning, true in respect of successive independent stages of action of a single carrier.[25]

6. Distinction Between (a) Carrier and (b) Passenger or Shipper.—Under principles stated above, in the present Chapter, there may be a distinction between (a) carrier, and (b) passenger or shipper.[26]

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[24]Gulf, Colorado & S. F. Ry. v. Texas, 204 U. S. 403; S 27:360; L 51:540. (The final carrier held entitled only to intrastate rate, which was lower than the proportional interstate rate would have been).

[25]The Pennsylvania Railroad Company maintained, in New York City, a cab-service, available to its passengers coming into that city from points outside the State. If such cab-service had been restricted to such passengers, and to those buying railroad tickets including a specific cab-transit, the cab-service would undoubtedly have been of intertransit character; but inasmuch as cabs were, in each case, engaged under a fresh contract, the cab-service was intrastate occupation, and subject to State law, as a local occupation. Pennsylvania R. R. v. Knight, 192 U. S. 21; S 24:202; L 48:325; (the railroad corporation held subject to a State tax laid upon the occupation of intrastate cab-service, as such).

The journey, however, as a whole, including the cab journey, might be intertransit, in respect of the traveler, although not so as to the occupation of the railroad corporation. See below.

[26]Thus, in a case just cited, (Pennsylvania R. R. v. Knight), the continuity of transit, while not existing from the standpoint of occupation-tax upon the carrier, existed as to the traveller, if the cab-journey was pursuant to a general original scheme of a journey from New Jersey to the point in New York ultimately reached by the cab-journey. See earlier numbered paragraphs of this section.

See New York Centr. R. R. v. Gray, 239 U. S. 583; S 36:176; L 60:451; to the effect that the Congressional anti-pass legislation is operative upon an intrastate portion of an interstate journey.

§ 209. Definition of Termination of Transit.

The matter of definition of termination of transit, as such, has been covered, in part, by the preceding discussion of continuity in intertransit. Certain particulars or aspects, however, of the matter may be most conveniently considered by themselves.

Temporary warehousing, by a carrier, on his own premises, at the end of his route, awaiting call by the consignee, is not, in and of itself, a termination of the transit by the carrier.[27]

The question of the termination of the transit may, in a particular instance, turn upon a question of general (non-Federal) law: as, upon the law of Sales or of Principal and Agent.[28]

To certain intents, and to a certain extent, intertransit proper, as above defined, is conventionally extended by the Federal so-called "Original Package" doctrine. That doctrine is, however, not wholly based upon intertransit, or upon the Federal intercommerce power. It is, therefore, considered at another point, by itself.[29]

§ 210. The Situation upon Termination of Intertransit.

Upon complete termination of intertransit, the Federal authority disappears, and State authority arises (in absence of discrimination against persons or things as subjects of the late intertransit). This situation is illustrated in State power of taxation of the occupation of sale and delivery of goods within the State—such State power extending to goods from without the State, in the absence of discrimination against such goods.[30]

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[27]Rhodes v. Iowa, 170 U. S. 412; S 18: 664; L 42: 1088; Heyman v. Southern Ry., 203 U. S. 270; S 27: 104; L 51: 178; Cleveland & St. Louis Ry. v. Dettlebach, 239 U. S. 588; S 36: 177; L 60: 453; Southern Ry. v. Prescott, 240 U. S. 632; S 36: 469; L 60: 836.

[28]Banker Bros. v. Pennsylvania, 222 U. S. 210; S 32: 38; L 56: 168.

[29]See Original Package (§§ 410, 411).

[30]Thurlow v. Massachusetts, 5 How. 504; L 12: 256; Fletcher v. Rhode Island, 5 How. 504 (both under the title "License Cases", 5 How. 504); Machine Co. v. Gage, 100 U. S. 676; L 25: 754; Emert v. Missouri, 156 U. S. 296; S 15: 367; L 39: 430; Kehrer v. Stewart, 197 U. S. 60; S 25: 403; L 49: 663; Banker Bros. v. Pennsylvania, cited above.

CHAPTER XXXVI.

THE SAME GENERAL SUBJECT CONTINUED:—(e) THE ELEMENT OF CONTRACT.

§ 211. The General Principle.

A contract necessarily comes into existence at some one place, and at some certain moment. In the pure making of a contract, therefore,—apart from negotiation or other preliminary—only some one certain political area is concerned, and, in so far, there is no intercommerce; and—so far as the Federal intercommerce power is concerned—the matter is within the scope, not of Federal but of State, Sovereignty and control, both as to actual contracts, and as to solicitation, negotiation, performance, and other Incidents; and as to both principals and agents.[1]

This proposition may perhaps be said to have its most

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[1]Nathan v. Louisiana, 8 How. 73; L 12:992; (valid State tax on exchange and money brokers); McCall v. California, 136 U. S. 104; S 10:881; L 34:391; (valid State regulation of the solicitation, within the State, of passenger traffic to extra-State points); Osborne v. Mobile, 16 Wall. 479; L 21:470; (valid State tax upon the occupation —conducted, in this case, by a foreign corporation—within a certain city, of an interstate express business as such: the resulting intertransit being viewed, as in the cases cited immediately above, as separable from, and as mere Incidents of, the intrastate contract of intertransit); Williams v. Fears, 179 U. S. 270; S 21:128; L 45:186; (valid State regulation of the occupation of engaging laborers for extra-State employment, although with provision as to intertransit, as an incident); Ware & Leland v. Mobile County, 209 U. S. 405; S 28:526; L 52:855 (valid State regulation of contracts of cotton futures, although intertransit may be indirectly affected); Engel v. O'Malley, 219 U. S. 128; S 31:190; L 55:128; (valid State regulation of private banking, incidentally operating upon transmission of money abroad); United States Fidelity Co. v. Kentucky, 231 U. S. 394; S 34:122; L 58:283; (valid State regulation of the intrastate operations of a foreign Commercial Credits agency corporation engaged, by contract, in furnishing information throughout the country); Hopkins v. United States, 171 U. S. 578; S 19:40; L 43:290; Anderson v. United States, 171 U. S. 604; S 19:50; L 43:300; (stock, cattle, and produce Exchanges). See also cases cited immediately below.

conspicuous and most important present application in the field of contracts (policies) of Insurance.[2]

It is immaterial that such a contract involves, for the carrying out of it, subsequent action constituting, in and of itself, intercommerce: as, in the case of Insurance payment, by intertransit, of periodical premiums, or dividends, or principal.[3]

It is immaterial that there be present the feature of delivery of a written instrument, embodying the contract (as, a bill of exchange, or written policy of Insurance): such feature being merely evidential, or, at most, merely incidental.[4]

It is likewise immaterial that a contract has been preceded by travel, correspondence, negotiation, applications, or other preliminaries, in and of themselves intercommerce: as in the case of a banker receiving moneys on deposit, for transmission of a like amount to a foreign country;[5] or of a broker in foreign exchange;[6] or, as in the case of a contract for transmission out of a State, of commercial ratings made within the State.[7]

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[2]Paul v. Virginia, 8 Wall. 168; L 19:357; Ducat v. Chicago, 10 Wall. 410; L 19:972; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566; L 19:1029; Philadelphia Fire Ass'n v. New York, 119 U. S. 110; S 7:108; L 30:342; Equitable Life Ass. Soc'y v. Clements, 140 U. S. 226; S 11:822; L 35:497; Noble v. Mitchell, 164 U. S. 367; S 17:110; L 41:472; New York L. Ins. Co. v. Cravens, 178 U. S. 389; S 20:962; L 44:1116; Mutual L. Ins. Co. v. Cohen, 179 U. S. 262; S 21:106; L 45:181; Mutual L. Ins. Co. v. Hill, 193 U. S. 551; S 24:538; L 48:788; Northwestern L. Ins. Co. v. McCue, 223 U. S. 234; S 32:220; L 56:419; New York L. Ins. Co. v. Deer Lodge County, 231 U. S. 495; S 34:167; L 58:332 (reviewing earlier cases); Ætna L. Ins. Co. v. Moore, 231 U. S. 543; S 34:186; L 58:356.

[3]Northwestern L. Ins. Co. v. McCue, cited above; New York L. Ins. Co. v. Deer Lodge County, cited above (reviewing earlier cases); Ætna L. Ins. Co. v. Moore, cited above. See Provident Savgs. Soc'y v. Kentucky, 239 U. S. 103; S 36:34; L 60:167 (cited elsewhere to another point).

[4]Cases cited above.

[5]Engel v. O'Malley, cited above.

[6]Nathan v. Louisiana, cited above.

[7]United States Fidelity Co. v. Kentucky, cited above.

§ 212. Contract of Purchase and Sale of Goods, with Intertransit Delivery by the Vendor.

A contract of purchase and sale of chattels, not accompanied by immediate delivery at the time and place of the making of the contract, but contemplating future delivery, has, at the Common Law, two different potential aspects: (a) to certain intents, and for certain purposes, a transaction of this class is viewed as separable into two elements, the contract proper and the delivery;[8]—while (b) to certain other intents, and for certain other purposes, it is viewed as a single transaction, extending over the space and the time involved in the contemplated delivery.

The question whether, in a given instance, (or in a given class of instances) the former, or the latter, aspect shall prevail, is, at the Common Law, determined by broad considerations of justice. The Federal law, in adopting the Common Law conception, and the general Common Law principles, in this field, takes—for the purposes of intercommerce—the second aspect above mentioned: namely, that of singleness of the transaction; with the resultant doctrine: that where the contemplated delivery involves, (and is, or is to be effected, by) intertransit, the whole transaction is colored and characterized by such intercommerce feature, and is, as a whole, intercommerce; and, as such, is within the scope of Federal, not of State, Sovereignty; and is (in the absence of Congressional permission) free from State direct power of inhibition, restriction, control, or regulation.

Thus, in the absence of such Congressional permission, a State cannot require that one proposing to purchase, at a place outside the State, and to have delivered to him thence, within the State, spirituous liquors, shall first furnish to officials of the State, a sample, for analysis, and obtain a certificate of purity of the liquor so proposed to be bought;[9] or restrict to State-licensed persons the right so

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[8] E. g., for the purposes of stoppage in transitu.

[9] Vance v. Vandercook Co. (No. 1), 170 U. S. 438; S 18:674; L 42:1100.

to purchase and bring in such liquors,[10] or other goods so contracted for;[11] or forbid delivery by the vendor.[12]

It is not material that the purchase was solicited in the State of delivery, by an agent of the vendor, provided the contract is made, in legal contemplation, in the vendor's area, as locus contractus;[13] nor is it essential that individual articles within a well-defined class, be ear-marked, by the vendor, for particular purchasers; nor is it material that a quantity of such articles are shipped, together, to such agent, in the purchaser's State, for delivery there.[14]

So, a fortiori, where each separate article is ear-marked, when shipped by the vendor.[15]

It is not essential to this result, that the chattels be in existence at the time (a) of solicitation, or (b) of the contract; but the contract may deal with chattels to be manufactured by the vendor-party.[16]

The Common Law, (Federally adopted), recognizes and differentiates a form of transaction known as "sales on approval": namely, delivery of goods under a contract by which the person receiving delivery may become the purchaser (upon terms fixed by the contract) at his option. What has been said in the last preceding section would seem, upon principle, to be applicable, mutatis mutandis, to such transactions.[17]

The Common Law doctrine of Incident (as Federally adopted and elaborated, in general) is operative in this field; as, in respect of a frame delivered (pursuant to the

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[10]Bowman v. Chicago & Northwestern Ry., 125 U. S. 465; S 8:689; L 31:700. See, also, Scott v. Donald, 165 U. S. 58; S 17:265; L 41:632.

[11]Crenshaw v. Arkansas, 227 U. S. 389; S 33:294; L 57:565; Stewart v. Michigan, 232 U. S. 665; S 34:476; L 58:786.

[12]Heyman v. Hays, 236 U. S. 178; S 35:403; L 59:527; (mail-order business); Kirmeyer v. Kansas, 236 U. S. 568; S 35:419; L 59:721: (liquor business; direct delivery, by wagons of the vendor).

[13]Crenshaw v. Arkansas, cited above; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304; S 34:493; L 58:974.

[14]Crenshaw v. Arkansas, cited above.

[15]Rogers v. Arkansas, 227 U. S. 401; S 33:298; L 57:569.

[16]As in the case of solicitation for orders for enlarged photographs or frames. Caldwell v. North Carolina, 187 U. S. 622; S 23:229; L 47:336; Dozier v. Alabama, 218 U. S. 124; S 30:649; L 54:965.

[17]See Dozier v. Alabama, cited above.

terms of the original transaction, but subject to the purchaser's option), as an attendant feature of a principal picture transaction.[18]

The doctrine of Incident does not, however, extend to supplemental services not vitally related to the contract of purchase and sale: as, the mere putting-up of lightning-rods so bought; but such services are within the scope of State power of regulation.[19]

It is immaterial whether the contract of purchase and sale and of delivery is made wholly between principals, or through an agent or agents of either party or both.[20]

It is immaterial, also, when or where preliminary solicitation or negotiation takes place. Thus, the principle in question is operative in a situation in which the owner of goods which are at the time outside of a certain State solicits, within such State, by an agent there being, the making, in the proposing vendor's jurisdiction, of a contract of purchase and sale of such goods, with provision for delivery by the vendor in such State. In, and in respect of such situation, Federal Sovereignty is (in the absence of Congressional permission to the State) exclusive; and the State in question can neither inhibit, nor regulate, nor hamper, nor otherwise deal directly and specifically with, the transaction as such: as, by license requirement, or occupation tax of or upon the vendor or his agent.[21]

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[18]Dozier v. Alabama, cited above; Davis v. Virginia, 236 U. S. 697; S 35:479; L 59:795.

[19]Browning v. Waycross, 233 U. S. 16; S 34:578; L 58:828.

[20]Cases, generally, cited in this section.

[21]Webber v. Virginia, 103 U. S. 344; L 26:565; Walling v. Michigan, 116 U. S. 446; S 6:454; L 29:691; Robbins v. Shelby District, 120 U. S. 489; S 7:592; L 30:694; Corson v. Maryland, 120 U. S. 502; S 7:655; L 30:699; Leloup v. Mobile, 127 U. S. 640; S 8:1383; L 32:311; Asher v. Texas, 128 U. S. 129; S 9:1; L 32:368; Stoutenburgh v. Hennick, 129 U. S. 141; S 9:256; L 32:637; Lyng v. Michigan, 135 U. S. 161; S 10:725; L 34:150; Crutcher v. Kentucky, 141 U. S. 47; S 11:851; L 35:649; Ficklen v. Shelby County, 145 U. S. 1; S 12:810; L 36:601; Brennan v. Titusville, 153 U. S. 289; S 14:289; L 38:719; Stockard v. Morgan, 185 U. S. 27; S 22:576; L 46:785; Caldwell v. North Carolina, cited above; Norfolk & Western Ry. v. Sims, 191 U. S. 441; S 24:151; L 48:254; Adams Ex. Co. v. Iowa, 196 U. S. 147; S 25:185; L 49:424; American Ex. Co. v. Iowa, 193 U. S. 133; S 25:182; L 49:417 (explaining O'Neil v. Vermont, 144 U. S. 323; S 12:393; L 36:450); Ware & Leland v.

What has been said above, in general terms, in respect of the intervention of agents, applies to particulars of delivery, as well as to the contract proper of purchase and sale. Thus, it is a matter of immaterial detail, whether a given purchaser's goods be shipped to him directly or separately, or be shipped with other goods, bought in like manner, to an agent of the vendor, in the purchaser's State, for delivery there to the purchaser by such agent.[22]

Pursuant to (Federally adopted) Common Law principles of sale and delivery, it is, further, immaterial, in the case of a lot of precisely similar articles, so shipped, that they are not separately ear-marked, for the particular purchasers, when shipped; but that allotment to the several purchasers, and the ear-marking, are left to be done by the vendor's agent-for-delivery.[23]

This principle applies to C. O. D. shipments by carrier.[24]

Mobile County, 209 U. S. 405; S 28:526; L 52:855; Dozier v. Alabama, cited above.

[22]Rearick v. Pennsylvania, 203 U. S. 507; S 27:159; L 51:295.

[23]Rearick v. Pennsylvania, cited above.

[24]Norfolk & Western Ry. v. Sims, 191 U. S. 441; S 24:151; L 48:254; American Ex. Co. v. Iowa, cited above; Adams Ex. Co. v. Kentucky, 206 U. S. 129; S 27:606; L 51:987; Louisville & Nashv. R. R. v. Cook Brewing Co., 223 U. S. 70; S 32:189; L 56:355. See, further, as to carriers, Rhodes v. Iowa, 170 U. S. 412; S 18:664; L 42:1088; Adams Ex. Co. v. Kentucky, 214 U. S. 218; S 29:633; L 53:972.

As to the so-called Wilson and Webb Acts, see § 405.

BOOK III.

PRINCIPLES OF INTER-RELATION, COMMON TO THE STATES OF THE UNION AND THE FEDERAL STATES:—THE STATES OF THE UNION AND THE FEDERAL STATES AS, COLLECTIVELY, TO CERTAIN INTENTS, A CONVENTIONAL COMMUNITY OF NATIONS.

PART I.—UNWRITTEN LAW:—DOMESTIC APPLICATION AND OPERATION OF THE FEDERALLY ADOPTED LAW OF NATIONS.

PART II.—WRITTEN (OR PARTLY WRITTEN, PARTLY UNWRITTEN), LAW.

PART I.

UNWRITTEN LAW: — DOMESTIC APPLICATION AND OPERATION OF THE FEDERALLY ADOPTED LAW OF NATIONS.

CHAPTER XXXVII.

INTER-AREA RELATIONS:—THE GENERAL PRINCIPLE.

§ 213. The States and the Federal States as, to Certain Extents, Co-ordinate; and as, Collectively, a Conventional Community of Nations.[1]

We consider at other points, certain principles of inter-relation limited to States of the Union, inter se.[2]

It is proposed, in the present Book of our treatise, to consider principles of inter-relation (fixed, in part, by Organic, in part by non-Organic, Federal law) operative (as matter of present actual Federal law), (a) as among the States of the Union; (b) as among the Federal States; and (c) as between a State of the Union and a Federal State:—operative, that is to say, as among the States and the Federal States collectively.

The component elements, (Organic, and non-Organic), of the body of law in question, (uniform in actual operativeness), may be considered, in a general way, at the present point, first, from the standpoint of the States of the Union, inter se; then from certain other standpoints.[3]

(1) BASES, AND SOURCES, AS AMONG STATES OF THE UNION.—As is stated at a later point,[4] the Federal Organic

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[1]"Federal States": i. e., politically organized Federal areas, as, a Territory, or the District of Columbia (§§ 52, 53).

"Area", "areal", etc. In the present Book (§§ 213-300), the term "area" is (except when a different sense is specifically denoted) employed (politically, or territorially, as the case may be), as a designation common to (a) a State of the Union and (b) a Federal State. So of "areal", "interareal", etc.

Substantive Law; Judicial Procedure. The present Book, like the other Books of the First Division of the treatise (Table of Contents, ad init.), is confined to Substantive law. The principles considered are, however, operative in Judicial Procedure also. See under Faith and Credit as Among Co-Ordinate Areas (§§ 644-650).

[2]§§ 140-142 (inter-State Treaty or "compact", as among States).

[3]For illustration of the propositions of the following numbered paragraphs; and for authorities, in so far as the propositions are not elementary, see, (in addition to citations in those paragraphs), the succeeding portions of the present Book, under particular heads.

[4]§§ 507, 508, 551.

law adopts the general Law of Nations, not merely for strictly Foreign relations, but for such relations, between or among States of the Union, as are not specifically fixed or provided for by the Constitution,—the States of the Union being viewed as, pro tanto, Sovereign nations, and as, collectively, a Community of Nations, within the contemplation of the Law of Nations. It is upon such Adoption, (to such intent, and to such effect) that the body of principles (to be considered in the present Book), rests, as among the States of the Union.

(2) As Between a State of the Union and Federal Area as Such.[5]—What has been said immediately above. is applicable, mutatis mutandis, to relations between (a) a State of the Union and (b) the United States in its Plenary Sovereignty[6] in, and based upon, Federal area (intra-State or extra-State),—the United States and a State of the Union being, pro tanto, equal in Sovereignty;[7] and, to these intents, the United States, (in its Plenary Sovereignty in Federal area), and the States, constitute a domestic Community of Nations, within the contemplation of the (Federally adopted) Law of Nations.

(3) Application to Subdivisions of Federal Area; and, in Particular, to Federal States.—It is obvious that the United States (a) does not enlarge, and (b) does not lose or diminish, its such status, as between itself and the States, by mere subdivision of the general body of Federal area into particular Federal areas (Organized or non-Organized); but that the principle stated in the last preceding numbered paragraph, is applicable, distributively, (as between the States severally, and the United States)[8] in respect of such subdivisions of Federal area: and, in particular, in respect of Federal States, severally.[9]

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[5]"As such": i. e., irrespective of division into minor areas, (a) Organized (Federal States), or (b) non-Organized (as, military posts, post-office sites, and the like).

[6]§§ 39 et seq.

[7]E. g., the United States, merely as Sovereign of a Federal area, has no more power over land-title in a State than the State has over land-title in the Federal area.

[8]See next paragraph.

[9]Maynard v. Hill, 125 U. S. 190; S 8:723; L 31:654 (incidental indirect extra-areal operation, in a State of the Union, of a Terri-

(4) Federal States, Inter Se.—Congress may fix, at pleasure, the relation of the Federal States inter se. In the absence of specific action, Congress is presumed to view the Federal States as (for purposes of inter-relation) quasi-Sovereign communities;[10] and as, collectively, a (conventional) Community of Nations, within the contemplation of the Law of Nations.

(5) As Among the States of the Union and the Federal States, Collectively.—Since uniformity exists, (in principles in question), (a) as among the States of the Union; (b) as among the Federal States; and (c) as between a State of the Union and a Federal State, it follows that, in and to the extent of such principles of inter-relation, the States of the Union and the Federal States constitute, (under present actual Federal law) a single, unified class, and a (conventional) Community of Nations, in the sense of the Law of Nations.[11]

The general scheme and intent of Congress, in the field in question, is broadly disclosed in Congressional legislation in such portions of the field as Congress has specifically dealt with.[12]

§ 214. Extension; Modification.

In some few particulars, in which the Constitution or Acts of Congress have enlarged upon, or have otherwise modified, the general Law of Nations, the general language of the Constitutional and of the Congressional texts assumes, and is qualified by, the Law of Nations.[13]

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torial Divorce); Atchison, T. & S. F. Ry. v. Sowers, 213 U. S. 55; S 29:397; L 53:695 (personal action, based upon a Territorial statute, held not limitable by the Territory to its own Courts, as against a State Court).

[10]As to exemption, in general, of Federal States as quasi-Sovereign, from private suit, see § 609, ¶ 6.

[11]As to the attitude of the United States in and in respect of a non-selfgoverning Federal State, see § 215.

As to Congressional power in the premises, as among, or as over, States of the Union, see § 51.

[12]See Privileges and Immunities (§§ 293-294); Domestic Extradition (§§ 295-300).

See also Faith and Credit, Chapter CIX (§§ 644-650), and cases cited.

[13]See Privileges and Immunities (§ 293, 294); Faith and Credit (§§ 644-650).

§ 215. Waiver, Pro Tanto, by the United States, of its Plenary Sovereignty.

We have considered elsewhere,[14] the principle of intra-State dominance of the Federal Plenary Sovereignty based upon Federal area. In so far as is essential to the scheme and polity considered in the preceding sections the United States waives its such Plenary Sovereignty.

§ 216. Relation to Due Process Texts, and to Other Like Texts, of the Constitution.

Most of the numerous particular propositions of the succeeding Chapters of the present part, either (a) exist as Federal law (as distinguished from the general law of Nations) only through and by the Due Process texts of the Constitution,[15] or (b) are, at least, dependent upon such Constitutional texts for Federal invocation, demonstration, or enforcement. Such propositions do not, however, exist as definite, mutually exclusive groups, each group attached to some particular Constitutional text; but, in the main, are, respectively, capable of Federal invocation, demonstration, or enforcement, under one or under another of such texts, according to accident of situation in pais, or of Judicial Procedure.[16]

We therefore, in the succeeding Chapters of the present Part, consider such propositions as a body of principles, without regard to such accident of invocation, demonstration, or enforcement.

§ 217. No Conflict of Laws.

What is known as Conflict of Laws, in the General Law of Nations, arises from and by difference of view as among nations, as to one or another particular of the Law of Nations. The law of the field now in question, being Federal law (and, thereby, one and the same, throughout the States and the Federal States), there can, as matter of definition, be no Conflict of Laws in the field.[17]

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[14] § 51.

[15] E. g., the Due Process texts of the Fifth and the Fourteenth Amendments, and the Impairment clause, (§§ 426-430).

[16] Cases, generally, cited in succeeding Chapters.

[17] See succeeding section.

§ 218. Possible Conflict in Judicial Findings of Fact.

1. Owing to the finality, in a large degree, either (a) by force of the Constitution,[18] or (b) by Congressional Judiciary legislation, and Congressional Policy as therein manifested,[19] of Judicial determinations (Federal or State) of fact, there may be Judicial adjudications, severally valid, but conflicting, in respect of a particular situation in pais.[20]

2. In the consideration of Federal Judicial decisions in the field in question, the distinction is constantly to be borne in mind between (a) a situation of fact, existing in pais; (b) a finding of fact in respect thereof; and (c) mere sufficiency, in law, of the evidence, to support the finding. Failure to recognize these distinctions is the cause of not infrequent misapprehension as to the legal effect of Judicial decisions.

§ 219. Bases of Congressional Power as to States of the Union, in the Field in Question.

We have spoken above,[21] of direct operation, proprio vigore,—(a) as among States of the Union, and (b) as between the States severally and the United States in its Plenary Sovereignty in, and based upon, Federal area—of the Federal Organic Adoption of the Law of Nations. It remains to speak of Congressional power of regulation, or of Extension[22] of relations thus created.[23]

(1) As between States, such Congressional power in this field, in so far as not specifically provided for by the Constitution, rests, or is capable of resting, either (a) upon the

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[18]See Finality of Verdict (§§ 658, 659).

[19]See § 802 (Error to State Court: Findings of Fact).

[20]Thus, if a judgment of one certain State, entitled, upon actual conditions of fact, to Faith and Credit, in other States, is offered in two other States, severally, it may be given Faith and Credit in one of those States, through a favorable finding, in that State, of Jurisdictional facts underlying the judgment; but may be denied Faith and Credit in the other State, by force of a contrary finding of fact. § 646, ¶ (3).

[21]§ 213, ¶¶ (1) and (2).

[22]"Extension": see §§ 554-556.

[23]As in the field of Privileges and Immunities (§§ 293, 294), and that of Extradition (§§ 295-390), in favor of a Federal area as against a State.

general principles of Extension,[24] or (b) upon the inherent and necessary incapacity of the States severally, under a principle elsewhere considered.[25]

(2) As between the United States and a State of the Union, such Congressional power rests, or is capable of resting, either (a) upon the principle of Extension,[26] or (b) upon the principle,[27] of the (exceptional) intra-State dominance, to certain intents, of the Federal such Plenary Sovereignty.

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[24]Ubi supra. [25]§§ 161-164. [26]Ubi supra. [27]§ 51.

CHAPTER XXXVIII.

Areal Power Based Upon Domicil.

§ 220. Uses of Terms:—"Resident"; "Residence".

Owing, perhaps, to the fact that the term "domicil" does not readily produce derivatives, the terms "residence", "resident", and "non-resident" have come into general use as designative, respectively (a) of domicil (or place of domicil); (b) of domiciled inhabitant; and (c) one not a domiciled inhabitant.

The distinction, however, between domicil, on the one hand, and mere personal presence (even for a considerable period) on the other hand, is strictly observed, in the Federal law, and is constantly to be borne in mind. Contentions of suitors, in numerous cases, have been based upon failure to observe the distinction.[1]

§ 221. The General Principle.

1. Subject to certain Federal limitations elsewhere considered,[2] a State has general power over its domiciled inhabitants.[3]

2. Subject to certain corresponding Organic limitations upon Federal action, elsewhere considered,[4] the United States (a) has such power over domiciled inhabitants of Federal area generally; and (b) may, and does, delegate it broadly to the self-governing Federal States.[5]

§ 222. Exclusiveness of Such Power.

Since a person can have but one domicil proper, power

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[1]See cases cited below in this Chapter.

In respect of Federal Adoption of the Common Law principles of Domicil, see Gilbert v. David, 235 U. S. 561, 569; S 35:164; L 59; 360.

[2]As, those of the Impairment clause and the Fourteenth Amendment.

[3]A great number of cases (of valid exercise of State power) cited under Property, Equal Protection of Law, Liberty, etc.

[4]As, those of the Fifth Amendment.

[5]See Federal Area.

of an area, based upon domicil, is necessarily exclusive as against other areas.[6]

§ 223. Power, Once Attached, as not Lost by Change of Domicil.

Power over a person, once attached, in a particular matter, in favor of an area, persists notwithstanding change of domicil of such person.

The principle finds application most commonly in the field of Judicial Procedure,[7] but is, from its nature, applicable in other fields: as, in Taxation.

§ 224. Extra-Areal Action of Inhabitants.

It is of course elementary that in general an area does not lose its power over its domiciled inhabitants merely by reason of their temporary absence from the area.

A domiciled inhabitant of an area owes the area (a) the duty of co-operating, wherever he may be, in the processes of government; and, a fortiori, (b) the duty of refraining from action, at home or abroad, hostile to such government. Thus, where an insolvent and a certain one of his creditors were domiciled in a certain State, and a Court of Insolvency of the State had taken jurisdiction of the insolvency and of the assets, and the debtor and the creditor had been made parties to the cause, it was competent to the Court to enjoin the creditor from interfering with the Insolvency procedure by maintaining, in another State, on his claim, an attachment suit, the result of which would have been to defeat equality of distribution of the assets as a whole, as between him and his fellow-inhabitants of the home area.[8]

§ 225. Operation, upon Property, of Change of Domicil.

In general, a person newly acquiring domicil within a particular area, thereby subjects his property to the policy of such area. Thus, a State in which Community of prop-

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[6] As to Trade Domicil, see that head.

[7] As in the case of an executor changing his domicil pending Probate Procedure. Michigan Trust Co. v. Ferry, 228 U. S. 346; S 33:550; L 57:867. So, Nations v. Johnson, 24 How. 195; L 16:628. See Jurisdiction, § 572.

[8] Cole v. Cunningham, 133 U. S. 107; S 10:269; L 33:538.

As to individual liberty of extra-areal making of contracts, see Liberty of Contract (§§ 492-495).

erty is an Incident of marriage solemnized within the State, may apply the rule to persons elsewhere married, but thereafter establishing their domicil in the State.[9]

§ 226. Separate Domicil of Husband and Wife.

Presumptively, and in general, the domicil of a wife is that of the husband.[10]

Husband and wife may, however, have separate domicils in different areas. This situation may arise under, or by force of, different conditions, partly of law, partly of fact. Thus, where a husband deserts his wife, and obtains (as he may, at will) a new domicil, leaving the wife in the pre-existing domicil, her domicil is not thereby changed.[11]

A fortiori is this true where the husband's change of area of domicil is made to avoid enforcement against him, in the area of the abandoned domicil, of a decree for separate support based upon his domiciliation there.[12]

Such separate domicil of a wife may exist for suit against her by a stranger.[13]

In such situation, the area of new domicil of the offending party has Divorce Jurisdiction, at his instance, as against the meritorious party (even though the latter be absent and non-assenting),—operative within the area,[14] but not operative extra-areally.[15]

The question whether the area of domicil of the meritorious party has broader power appears not to have been passed upon.

A neutral area, (that is to say, an area in which neither husband nor wife is domiciled) has no power over a husband or wife not present within the area and not volun-

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[9]Conner v. Elliott, 18 How. 591; L 15:497.

[10]Atherton v. Atherton, 181 U. S. 155; S 21:544; L 45:794 (evidence before a State Court held not sufficient to overcome the presumption).

[11]Barber v. Barber, 21 How. 582, L 16:226 (a case of diversity of citizenship for Federal Procedure, but pertinent generally); see Maynard v. Hill, 125 U. S. 190; S 8:723; L 31:654; Haddock v. Haddock, 201 U. S. 562; S 26:525; L 50:867.

[12]Barber v. Barber, cited above.

[13]Williamson v. Osenton, 232 U. S. 619; S 34:442; L 58:758.

[14]Maynard v. Hill, cited above (Legislative divorce); approved, Haddock v. Haddock, cited above.

[15]Barber v. Barber; Haddock v. Haddock, both cited above.

tarily submitting to its jurisdiction, at the instance of the other party, even where such other party is personally present within the neutral area; and it is immaterial, to this intent, that such personal presence (without domicil) is of such external aspects, and of such length as to amount (in a popular sense of the term) to "residence" there.[16]

Where a State, in textual vesting and definition of Divorce Jurisdiction in its Courts, employs the term "resident," that term is Federally viewed as presumptively meaning "domiciled inhabitant", and as correspondingly limited in legal effect.[17]

Where the respondent party appears and submits to the jurisdiction either (a) of the area of domicil of the other party, or (b) of a neutral area, the question of power of the area of forum, depends upon general principles of personal jurisdiction over non-inhabitants.[18]

§ 227. No Power of Extra-Areal Fixing of Personal Liability.

1. The principle, above considered, of areal power of an area over its domiciled inhabitants, involves the corollary of absence, in a particular area, of power of fixing, by judgment, personal liability upon an absent person not of domicil within, and not served with process within, the area, and not submitting himself to its jurisdiction,[19] even by way of Incident to a judgment valid as against (and validly operative upon), his property within the area.[20]

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[16]Bell v. Bell, 181 U. S. 175; S 21:551; L 45:804; German Savings Soc'y v. Dormitzer, 192 U. S. 125; S 24:221; L 48:373; Andrews v. Andrews, 188 U. S. 14; S 23:237; L 47:366.

[17]Cheely v. Clayton, 110 U. S. 701; S 4:328; L 28:298; Bell v. Bell, cited above; Streitwolf v. Streitwolf, 181 U. S. 179; S 21:553; L 45:807.

[18]As in Cheever v. Wilson, 9 Wall. 108; L 19:604; Laing v. Rigney, 160 U. S. 531; S 16:366; L 40:525. See Jurisdiction.

[19]D'Arcy v. Ketchum, 11 How. 165; L 13:648; Public Works v. Columbia College, 17 Wall. 521; L 21:687; Pennoyer v. Neff, 95 U. S. 714; L 24:565; St. Clair v. Cox, 106 U. S. 350; S 1:354; L 27:222; Freeman v. Alderson, 119 U. S. 185; S 7:165; L 30:372; Grossmayer, Pet'r, 177 U. S. 48; S 20:535; L 44:665; Wetmore v. Karrick, 205 U. S. 141; S 27:434; L 51:745; Simon v. Southern Ry., 236 U. S. 115; S 35:255; L 59: 492; Riverside Mills v. Menefee, 237 U. S. 189; S 35:579; L 59:910.

[20]Freeman v. Alderson, and other cases, cited above.

2. The principle extends to the field of Taxation.[21]

§ 228. State Power of Insolvency Discharge.

We refer elsewhere to the principles under which an area may (in the absence, or to the extent of absence, of Congressional action) discharge debtors from liability to suit where (1) the Insolvency Act in question antedated the contract liability in question;[22] and (2) the contract was made within the area of the Insolvency legislation;[23] and (3) the creditor was, at the date of the Insolvency Procedure, a domiciled inhabitant of such area;[24] and, perhaps, —if not such inhabitant—where he was personally served with process within the area, in the Insolvency proceeding;[25] and (4) where the creditor's suit is in a Court of the area in question,[26] (or in a Federal Common Law or Equity Court within a State in question).[27]

Where, however, the first of these features is lacking, the discharge is ineffectual (as violative of the contract) by reason of retroactive character of the Act, and its failure, thereby, to enter into, and to qualify the contract;[28] where the second feature is lacking, the discharge is invalid by reason of incompetency of an area to act extra-areally even in an anticipatory way, with contracts made elsewhere;[29] where the third feature is lacking, the discharge is ineffectual, by reason of absence of power of the area in question to exercise jurisdiction in the Insolvency proceeding, over absent non-residents;[30] and where the fourth feature is not present, the discharge is ineffectual by reason of incapacity of a State (or of a Federal State, under present Congressional legislation) to terminate the indebtedness, (that is, to do more than to deal with Procedure); and its

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[21]Dewey v. Des Moines, 173 U. S. 193; S 19:379; L 43:665.

[22]§ 457, ¶ (2). [23] § 221.

[24]Baldwin v. Hale, 1 Wall. 223; L 17:531; Baldwin v. Bank of Newbury, 1 Wall. 234; L 17:534; Gilman v. Lockwood, 4 Wall. 409; L 18:432.

[25]See remarks in Opinions in cases above cited.

[26]§§ 221; 557-560. Opinions generally, in cases cited in this section.

[27]§§ 746-752; 733-771. [28]§ 457, ¶¶ (4), (5).

[29]§§ 492-495. [30]§§221; 227; 646, ¶ (3).

incapacity, therefore, to deal with Procedure of another area.[31]

§ 229. Areal Power Based upon Domicil at the Time of Decease.

Power of an area, based upon area, extends to the situation arising upon decease of a domiciled inhabitant of the area: as, in respect of testamentary power; intestate succession; distribution of the estate; succession taxes, and the like,[32] to the extent, of course, only of the Sovereignty or quasi-Sovereignty of a State (or a Federal State) in question, as defined by principles broader than that now immediately in question.[33]

§ 230. Determination of the Fact of Death.

When a person, once domiciled within a certain area, has never acquired domicil in another area, the former area has, as among the class of areas in question, power of adjudication of the question whether he is, at a given time, still living.[34]

§ 231. Determination of Domicil at Time of Decease.

The question of domicil, at the time of death, within a particular area, is strictly Jurisdictional; and no one area can determine that question, in its own favor, as against other areas.[35]

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[31]In each of the cases cited below, if we interpret them rightly, two or more, or all, of the four features of ineffectuality were present: so that these cases are not in strictness capable of being cited to any one of the four limitative propositions of the text. Clark's Ex'ors v. Van Riemsdyk, 9 Cr. 153; L 3:688; M'Millan v. M'Neill, 4 Wh. 209; L 4:552; Cook v. Moffat, 5 How. 295; L 12:159; Sturges v. Crowninshield, 4 Wh. 122; L 4:529; Ogden v. Saunders, 12 Wh. 213; L 6:606; Shaw v. Robbins, 12 Wh. 369, note; Boyle v. Zacharie, 6 Pet. 348; L 8:423.

[32]See under these and other heads.

[33]E. g., by exclusive home power over land (§§ 239, 240).

[34]Cunnius v. Reading School District, 198 U. S. 458; S 25:721; L 49:1125; Blinn v. Nelson, 222 U. S. 1; S 32:1; L 56:65; Christianson v. King County, 239 U. S. 356; S 36:114; L 60:327.

In Scott v. McNeal, 154 U. S. 34; S 14:1108; L 38:896, actual death, (not mere allegation and finding of death), was, by State statute, a condition of Jurisdiction of Probate Courts; (see at p. 47).

[35]Thormann v. Frame, 176 U. S. 350; S 20:446; L 44:500; Overby v. Gordon, 177 U. S. 214; S 20:603; L 44:741; Tilt v. Kelsey, 207 U. S. 43; S 28:1; L 52:95; Burbank v. Ernst, 232 U. S. 162; S 34:299; L 58:551.

CHAPTER XXXIX.

Areal Power as Based Upon Presence, Actual or Constructive.

§ 232. The General Principle.

The general Law of Nations (as accepted by the Common Law, and as Federally adopted), recognizes power, in a variety of matters, as vested in a Sovereign, or quasi-Sovereign, political society, over persons, natural or artificial, of foreign domicil, but actually or constructively present, and as so present. The principles of the matter obtain, as Federal law, among the conventionally co-ordinate areas now in question.

§ 233. Illustration.

Federal application of those principles is most familiarly seen in power of one area to acquire, in general, Judicial jurisdiction over a person not of domicil within the area, by service of process within the area.

It is illustrated, further, (in the same general field) by the power of an area to take jurisdiction of one promisor in a joint contract, and to render judgment as against him, although it may have no actual jurisdiction of the other promisor.[1]

Persons on board of a vessel of extra-areal character or situs, physically present within an area, are not thereby removed from the criminal jurisdiction of such area.[2]

§ 234. Constructive Presence.

What is said above, in general terms, is applicable, mutatis mutandis, to constructive presence through an agent, subject to general principles of the Common Law of Agency.[3]

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[1]Renaud v. Abbott, 116 U. S. 277; S 6:1194; L 29:629.

[2]Foppiano v. Speed, 199 U. S. 501; S 26:138; L 50:288; so, Wildenhus' Case, 120 U. S. 1; S 7:383; L 30:565; (a case of alien seaman of, and upon a vessel of situs in, a foreign country; there being no Treaty limitative of State power).

[3]See Foreign Corporations; Service of Process; Taxation.

CHAPTER XL.

Quasi-Public Status.

§ 235. The General Principle.

Action of one area, in the form of investing a private individual with a quasi-public official status, (as, that of executor, administrator, guardian, or receiver), obviously can have no direct extra-areal operation, proprio vigore; and the status does not, in other areas, attend upon the individual possessor of it, when, or in so far as, he is personally or constructively present in such other area.[1]

§ 236. Extra-areal Ancillary Action:—Voluntary Individual Yielding.

One area may give effect to such status of another area, by granting, either to the same individuals, or to others, an ancillary status, to such extent as may be necessary or convenient for effectuating the legitimate purposes of the principal status; or it may attribute directly, within its own area, the foreign status.[2]

Such recognition is sometimes made by way of mere Comity, without specific provision of law therefor; as, in recognition of a voluntary payment, in one area, to an executor, an administrator, or a guardian, of another area, without ancillary appointment in the area of payment,[3]

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[1]Vaughan v. Northup, 15 Pet. 1; L 10:639; Watkins v. Holman, 16 Pet. 25; L 10:873; Aspden v. Nixon, 4 How. 467; L 11:1059; Stacy v. Thrasher, 6 How. 44; L 12:337; Peale v. Phipps, 14 How. 368; L 14:459; McLean v. Meek, 18 How. 16; L 15:277; Noonan v. Bradley, 9 Wall. 394; L 19:757; Hoyt v. Sprague, 103 U. S. 613; L 26:585; Clarke v. Clarke, 178 U. S. 186, 193, 194; S 20:873; L 44:1028; Evans v. Nellis, 187 U. S. 271; S 23:74; L 47:173; Hale v. Allinson, 188 U. S. 56; S 23:244; L 47:380; Finney v. Guy, 189 U. S. 335; S 23:558; L 47:839; Brown v. Fletcher's Estate, 210 U. S. 82; S 28:702; L 52:966.

[2]As, by permitting executors, of other areas, to sue without ancillary appointment: as in Hayes v. Pratt, 147 U. S. 557; S 13:503; L 37:279; Manley v. Park, 187 U. S. 547; S 23:208; L 47:296.

[3]Mackey v. Coxe, 18 How. 100; L 15:299; Wilkins v. Ellett, 9 Wall. 740; L 19:586; Wilkins v. Ellett, 108 U. S. 256; S 2:641; L

provided there is, in the area of payment, no ancillary proceeding or pending application therefor.[4]

Ancillary appointment is, of course, operative only in respect of matters and things inherently within the political and Judicial Jurisdiction of the ancillary area.[5]

§ 237. Quasi-Official Person Vested (and as Vested) with Title.

Where an area vests in a person who holds a quasi-official status, not merely possession or custody of property, but title (upon a trust required by his status), such person stands, in other areas, not upon his status, but upon his title.[6]

In certain areas, provision is made by statute, that land within such an area shall vest directly, in legal title, in an executor, or an administrator, duly appointed in the area of the decedent.[7]

§ 238. Voluntary Submission, by a Quasi-Official Person, to the Jurisdiction of Another Area.

It is competent to an executor or an administrator, in the absence of inhibition by his own area, to submit himself, in his such quasi-official capacity, to the Judicial Jurisdiction of another area.[8]

27:718; Wyman v. Halstead, 109 U. S. 654; S 3:417; L 27:1068; Darlington v. Turner, 202 U. S. 195; S 26:630; L 50:992.

The proposition of our text might, perhaps, be broadened to make such voluntary payment matter of Federal right or of Federal protection. The cases cited, however, warrant no broader statement than that of the text.

[4]Overby v. Gordon, 177 U. S. 214; S 20:603; L 44:741.

[5]E. g., a judgment, in a State Court, against an ancillary receiver, there appointed, is operative (in the absence of exceptional conditions, as, of effectual general submission to the Jurisdiction), only in respect of property in the ancillary area. Reynolds v. Stockton, 140 U. S. 254; S 11:773; L. 35:464.

[6]Harper v. Butler, 2 Pet. 239; L 7:410; Johnson v. Powers, 139 U. S. 156; S 11:525; L 35:112; Price v. Forrest, 173 U. S. 410; S 19:434; L 43:749; United States v. Borcherling, 185 U. S. 223; S 22:607; L 46:884; Bernheimer v. Converse, 206 U. S. 516; S 27:755; L 51:1163; Converse v. Hamilton, 224 U. S. 243; S 32:415; L 56:749.

[7]See Manley v. Park, 187 U. S. 547; S 23:208; L 47:296.

[8]Lawrence v. Nelson, 143 U. S. 215; S 12:440; L 36:130; (a case of a Federal judgment, but operative, under Federal law, as a foreign judgment).

CHAPTER XLI.

POWER, AND EXCLUSIVENESS OF DIRECT POWER, OF AN AREA REI SITAE, OVER LAND:—INCIDENTS:—INDIRECT EXTRA-AREAL POWER.[1]

§ 239. Federal Definition of Land.

Pursuant to, and following, the Common Law conception and practice, the Federal law, for purposes of inter-areal relations, (a) maintains and applies universally certain broad principles of definition of land; but (b) permits in the several areas respectively, such degree of variation, in particulars, as is consistent with a general Federal scheme.[2]

§ 240. The General Principle:—Illustration.

Over, and in respect of land, the area of situs has—as between or as among areas—exclusiveness of direct control.[3]

Thus, one area cannot tax land in another area,[4] even when it is owned by a citizen or a corporation of the taxing area.[5]

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[1]"Land": i. e., in the Common Law sense, including water-areas, buildings and other artificial structures, and particular estates in physical land; as, chattel estates in such land.

[2]As, in local areal power of classing the mortgagee's estate in land, for taxation, as against a non-resident mortgagee, as real estate, even where a mortgagee's estate is, in the area in question, classed, for other purposes, and in general, as a chattel estate. Savings Society v. Multnomah County, 169 U. S. 421; S 18:392; L 42:803.

[3]As to indirect extra-areal power, see § 245.

[4]Louisville etc. Ferry Co. v. Kentucky, 188 U. S. 385; S 23:463; L 47:513; Fargo v. Hart, 193 U. S. 490; S 24:498; L 48:761; Oklahoma v. Wells, Fargo & Co., 223 U. S. 298; S 32:218; L 56:445.

[5]Louisville etc. Ferry Co. v. Kentucky, cited above.

This principle looks to Substance, not to Form. Thus, extra-areal land cannot in effect be taxed, by the mere process of adding its value to that of property within the taxing area. Louisville etc. Ferry Co. v. Kentucky, cited above: incapacity of the home State of a ferry corporation, in taxing the corporate franchise, to fix its value by including value of a real estate easement (a landing easement) in another State; applicable, a fortiori, to the case of a natural person domiciled in the taxing area. There is nothing to the contrary in Com-

Local power is illustrated in the field of land-title in general, as, in respect of operation, upon land-title, of the running of a local Statute of Limitations;[6] of lien upon growing crops;[7] of distribution of the burden of an incumbrance among successive purchasers;[8] of right of riparian owners, in respect of use and taking of water;[9] of land-transfer, in general, inter vivos;[10] of devise;[11] of construction of a will, in respect of devise;[12] of Insolvency legislation otherwise of areal competency;[13] of appointment of a local guardian, in respect of land of a non-inhabitant infant, independent of general guardianship in the infant's area of domicil;[14] and of incompetency of a guardian ad litem appointed in the area of domicil of an infant, to bind the infant to a judgment of title in the area of situs of land.[15]

The principle is illustrated in the incompetency of another area to operate upon land within an area in question, by fixing personal status. Thus, creation, by one area, of the Marriage status, has no operation on land of either party in another area, but it remains, as before, within the power of the area of situs.[16]

So, of legitimizing of children[17] and of adoption.

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mercial Bank v. Chambers, 182 U. S. 556; S 21:863; L 45:1227. In that case there was presented simply (a) a question of construction of the national banking Act; and (b) a question of discrimination by a State against national banks. The question of extra-areal power of taxation of extra-areal land was not raised, nor was it considered.

[6]Dupree v. Mansur, 214 U. S. 161; § 643; S 29:548; L 53:950.

[7]Walworth v. Harris, 129 U. S. 355; S 9:340; L 32:712.

[8]Orvis v. Powell, 98 U. S. 176; L 25:238.

[9]Hudson Water Co. v. McCarter, 209 U. S. 349; S 28:529; L 52:828; in particular, at p. 354: "The courts below" * * *

[10]United States v. Crosby, 7 Cr. 115; L 3:287; Arnett v. Reade, 220 U. S. 311; S 31:425; L 55:477. (As to other aspects of the latter case, see elsewhere, where cited).

[11]Robertson v. Pickrell, 109 U. S. 608; S 3:407; L 27:1049.

[12]Clarke v. Clarke, 178 U. S. 186; S 20:873; L 44:1028.

[13]Shelby v. Bacon, 10 How. 56; L 13:326; Denny v. Bennett, 128 U. S. 489; S 9:134; L 32:491; Robinson v. Belt, 187 U. S. 41; S 23:16; L 47:65.

[14]Hoyt v. Sprague, 103 U. S. 613; L 26:585.

[15]Clarke v. Clarke, cited above.

[16]Conner v. Elliott, 18 How. 591; L 15:497.

[17]Olmsted v. Olmsted, 216 U. S. 386; S 30:292; L 54:530; Hood v. McGehee, 237 U. S. 611; S 35:718; L 59:1144.

It is illustrated in the field of Judicial Jurisdiction. Thus, the area of situs has power of direct Judicial action in rem upon the land, and may exercise the power either (a) in respect of certain particulars of title (as, in Judicial confirmation of a tax-deed title);[18] or of escheat title, based upon lack of heirs;[19] or of confirmation of a Judicial sale;[20] or (b) in respect of the whole title (as, in general title-clearing procedure);[21] and may act by attachment or execution, or the like, without personal jurisdiction of the person adversely interested.[22]

Exclusiveness of the area of the situs of land is illustrated in the principle that a Court of another area, although having personal jurisdiction of the owner of the land, cannot be vested with power to effect transfer of title in the land, as against such owner, either by decree purporting to operate directly upon such title, or through a Master's deed.[23]

So, a Probate Court's order of sale of land has no operation out of the area of the forum.[24]

The power and the exclusiveness of the area rei sitae extend to control of the matter of actions local in nature dealing with land title.[25]

§ 241. Inter-Areal Bridges.

A bridge is neither more nor less than land,—being part and parcel (and an upper stratum) of the (flowed or unflowed) natural land beneath it; and, for the purposes now in question, an inter-areal bridge is merely two contiguous parcels of land meeting at the inter-area bound-

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[18]Parker v. Overman, 18 How. 137; L 15:318; Thomas v. Lawson, 21 How. 331; L 16:82.

[19]Hamilton v. Brown, 161 U. S. 256; S 16:585; L 40:691; Christianson v. King County, 239 U. S. 356; S 36:114; L 60:327.

[20]Jeter v. Hewitt, 22 How. 352; L 16:345.

[21]American Land Co. v. Zeiss, 219 U. S. 47; S 31:200; L 55:82.

[22]Cheever v. Wilson, 9 Wall. 108; L 19:604 (enforcement, as against land, of a Divorce decree including a property feature).

[23]Fall v. Eastin, 215 U. S. 1; S 30:3; L 54:65.

[24]Watkins v. Holman, 16 Pet. 25; L 10:873; Hoyt v. Sprague, cited above.

[25]Ellenwood v. Marietta Chair Co., 158 U. S. 105; S 15:771; L 39:913.

ary-line; each parcel being, for such purposes, on the footing of other land, of its home area.[26]

§ 242. **Upper, and Lower, Area, upon a Stream.**

Where a stream flows from one area into another, neither area has full control over the flow and the purity of the water; but power over the stream, in those respects, exists distributively, between the two areas, in consonance (a) with the Common Law of land-title, and (b) with the general principles of the Law of Nations. Thus, the upper area cannot, by acts done within its own limits, limit or adversely affect the flow of the lower area.[27]

§ 243. **Purity of Air.**

What has been said above of water is applicable, mutatis mutandis, to the air. Thus, one area may not poison (or sanction the poisoning of) the air within another area.[28]

§ 244. **Nuisances, in General.**

What has just been said of violations of the purity of the air, is applicable, mutatis mutandis, in principle, to disturbance by (or by the sanction of) one area, of the peace and order of another area; as by noises within the Common Law conception of nuisances.

§ 245. **Indirect Extra-Areal Power.**

While one area cannot exercise power directly upon, or over, land lying within another area, it can exercise such power, under certain conditions, indirectly, through power over a person.

The principal (or the more common and familiar) form in which this result is effected, is through Judicial juris-

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[26]Pittsburgh etc. Ry. v. Board of Pub. Works, 172 U. S. 32; S 19: 90; L 43:354; Henderson Bridge Co. v. Henderson City, 141 U. S. 679; S 12:114; L 35:900.

As to inter-areal bridges as (to certain Federal intents) units, see Commerce, (Bridge).

[27]New York City v. Pine, 185 U. S. 93, 96; S 22:592; L 46:820; Missouri v. Illinois & Chicago Dist., 200 U. S. 496; S 26:268; L 50: 572; Kansas v. Colorado, 206 U. S. 46; S 27:655; L 51:956; Hudson Water Co. v. McCarter, 209 U. S. 349; S 28:529; L 52:828; Rickey Land etc. Co. v. Miller & Lux 218 U. S. 258; S 31:11; L 54: 1032.

[28]Georgia v. Tennessee Copper Co., 206 U. S. 230; S 27:618; L 51:1038; 237 U. S. 474; S 35:631; L 59:1054; 240 U. S. 650; S 36:465; L 60:846.

diction and control of the person. Thus, if one area, having actual personal Judicial jurisdiction over one who owns land in another area, and having physical actual control of his person, compels him, through Judicial Procedure, to execute and acknowledge and deliver a deed of conveyance of such land, such deed is operative in the area rei sitae, precisely as if made voluntarily.[29]

So, a personal judgment, rendered in one area, may, ultimately and indirectly, operate upon land title in another area, by force of a judgment in the second area, upon the original judgment, and execution.

So, a judgment rendered, inter partes, in one area having personal jurisdiction of the parties, specifically determinative, inter partes, of title to land in another area, is entitled to Faith and Credit in another area; and may thus have ultimate operation upon the land in the latter area.[30]

To the extent of the proper field of Public Policy, an area may limit the making, within the area, of contracts for the sale and purchase of land, including land in other areas; and enforce such provisions, in a personal action, in its own Courts.[31]

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[29]As matter of Faith and Credit, q. v.

[30]As in Cheever v. Wilson, 9 Wall. 108; L 19:604.

[31]Selover, Bates & Co. v. Walsh, 226 U. S. 112; S 33:69; L 57:146; (statute ameliatory of certain harsh features of the Common Law).

CHAPTER XLII.

Corporeal Chattels.

§ 246. **The General Principle.**[1]

What has been said above, in respect of land, is true, mutatis mutandis, of corporeal chattels, physically within an area.[2]

Thus, the principle of title to land by adverse possession, as against all the world, may be extended, by a particular area, to such chattels;[3] and an area may provide for Procedure in Rem, with like effect,[4] title thus locally established following the chattel into other areas into which it may be transported.[5]

So, of statutory provision for symbolical delivery in pledge, of corporeal chattels practically not capable of actual delivery.[6]

The area of situs may provide in respect of form of transfer of title, as, by requirement of record of a mortgage.[7]

On the other hand, there can be no direct extra-areal exercise of power over corporeal chattels not having situs in an area in question.[8]

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[1]See also §§ 291, 292.

[2]Mason v. Matilda, 12 Wh. 590; L 6:738; Bulkley v. Honold, 19 How. 390; L 15:663.

[3]Shelby v. Guy, 11 Wh. 361; L 6:495.

[4]Bank of the United States v. Lee, 13 Pet. 107; L 10:81; Green v. Van Buskirk, 5 Wall. 307; L 18:599; 7 Wall. 139; L 19:109; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664; L 23:1003.

[5]Cases above cited.

[6]Taney v. Penn Bank, 232 U. S. 174; S 34:288; L 58:558; Dale v. Pattison, 234 U. S. 399; L 58:1370.

[7]Green v. Van Buskirk, 7 Wall. 139, cited above (record requirement of State of situs operative as against a mortgage made in another State between citizens of the latter State).

[8]Security Trust Co. v. Dodd, Mead & Co., 173 U. S. 624; S 19:545; L 43:835: (an Insolvency assignment, under order of Court, in one State, not operative upon chattels of situs in another State, as against persons not domiciled in the former State).

King v. Cross, 175 U. S. 396; S 20:131; L 44:211: (incompetency of one State, by an Insolvency Act, to dissolve or to inhibit, attachment on mesne process, in another State, of property there situated, of the debtor, in a suit by one not an inhabitant of the State).

§ 247. Legal Status of a Chattel.

What has been said of local fixing of title to a corporeal chattel, seems to be applicable, mutatis mutandis, to the legal status of such chattel.[9]

§ 248. Conventional Situs within an Area:—Corporeal Chattels at Sea.

Corporeal chattels at sea, outside of the limits of any one of the areas in question, are conventionally within the area of domicil of the owner.[10]

§ 249. Estoppel to Deny Presence of a Chattel within a Particular Area.

Physical removal of a chattel from a particular area, may, as against those effecting the removal, still leave the chattel conventionally within the original area; as, where the removal is tortious,[11] or is effected surreptitiously, and for the purpose of defeat of jurisdiction of the original area.[12]

§ 250. Taxation.

1. Generally, and in the absence of certain exceptional situations, considered below, corporeal chattels can be taxed only by the area of physical situs.[13]

2. The principle in question forbids what is in effect extra-areal taxation, attempted to be made in the form of attaching to corporeal chattels, physically within the tax-

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[9]See Brown v. Duchesne, 19 How. 183; L 15:595: a machine, having in Great Britain, a lawful status in the hands of its owner, and there lawfully placed as an appliance upon a vessel, and coming here with the vessel, not subject to a de-legalizing operation, here, of our Patent laws, although, if made and owned here, it would involve Patent infringement.

[10]Crapo v. Kelly, 16 Wall. 610; L 21:430: (operativeness of a State Judicial Insolvency assignment—there being no conflicting Federal Bankruptcy Act in force—upon a vessel of the insolvent, at sea).

[11]Overby v. Gordon, 177 U. S. 214; S 20:603; L 44:741.

[12]Buck v. Beach, 206 U. S. 392; S 27:712; L 51:1106.

[13]Thus, if a manufacturer sends his product into another State, to be kept there permanently until sold, it is there taxable. Kehrer v. Stewart, 197 U. S. 60; S 25:403; L 49:663; Selliger v. Kentucky, 213 U. S. 200; S 29:449; L 53:761.

Railroad cars, permanently kept out of the home area of a railroad corporation, are not there taxable. Union Transit Co. v. Kentucky, 199 U. S. 194; S 26:36; L 50:150; Chicago, B. & Q. Ry. v. Babcock, 204 U. S. 585; S 27:326; L 51:636. So, coal owned by a

ing area, a value derived in part from value of extra-areal chattels, not directly taxable by such area.[14]

3. What has been said above, of corporeal chattels in general, is applicable to vessels. That is to say, if a given vessel is constantly kept employed in a certain area, or treats that area as its home port, it has situs there, and is taxable there, without regard to domicil of the owner, or (in the case of registered or enrolled vessels) to the statutory home port.[15]

Mere transient presence, in an area, of a vessel, in the course of its employment, does not create a situs there, for purposes of taxation,[16] notwithstanding enrollment in the latter area.[17]

When the course of actual employment, and of actual movements, of a vessel, are such that no actual situs is acquired (under the principles above stated), in any one area, the conventional "home port," as defined by the Federal enrollment and registration legislation, is the legal domicil of the vessel; and the area within which such home port lies is the area of situs for taxation.[18]

4. Where one corporeal chattel is, in its nature and in its actual use, ancillary to another corporeal chattel, it

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coaler railroad corporation, held by it for sale in a certain State, and not to be brought into the taxing State, is taxable only in the State of physical situs. Delaware, L. & W. R. R. v. Pennsylvania, 198 U. S. 341; S 25:669; L 49:1077.

[14]Fargo v. Hart, 193 U. S. 490; S 24:498; L 48:761: valuation by a State, for taxation of chattels (of an express company), within the area, by including in the valuation the value of chattels of the company permanently out of the area, and not used in the business, held invalid.

[15]Transportation Co. v. Wheeling, 99 U. S. 273; L 25:412; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299; S 25:686; L 49:1059; Gromer v. Standard Dredging Co., 224 U. S. 362; S 32:499; L 56:801.

[16]Hays v. Pacific Mail Co., 17 How. 596; L 15:254; as, in the case of the intermittent presence of a ferry-boat between two States (St. Louis v. Ferry Co., 11 Wall. 423; L 20:192); or of a coasting vessel. Morgan v. Parham, 16 Wall. 471; L 21:303; Ayer & Lord Co. v. Kentucky, 202 U. S. 409; S 26:679; L 50:1082; Southern Pac. Co. v. Kentucky, 222 U. S. 63; S 32:13; L 56:196.

[17]Cases last cited.

[18]Old Dominion S. S. Co. v. Virginia, (cited above), at p. 307.

follows the principal chattel in respect of situs for taxation.[19]

5. The principles above considered are not qualified by the fact of actual presence, in one area, of written muniments of title, of a corporeal chattel physically in another area: as, in the case of warehouse receipts.[20]

6. Migratory inanimate chattels, as, railroad cars, if, for some substantial part of a period of time in question, kept within the area of domicil of the owner, have, for purposes of taxation, their situs there.[21] Where, as in the case of the rolling stock of a multi-areal railroad, such migratory chattels are (a) constantly out of the area of the owner's domicil; (b) are not continuously within any one other area; but (c) are migratory among areas other than that of domicil of the owner, there is applied to them a doctrine of Equitable nature (closely akin to the Equitable doctrine of Cy Pres): to the effect that an area may tax the average number of such chattels within the area.[22]

The principles considered above are not qualified by the mere fact that a corporeal chattel in question is engaged in intercommerce.[23]

§ 251. Creatures Ferae Naturae not Reduced to Possession.

It is competent to an area to forbid the killing, or the transportation, or having in possession, within the area, but for extra-area use, of animals or birds ferae naturae and not reduced to private possession.[24]

This doctrine may rest upon the Common Law proposition that such animals and birds, while actually in the

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[19]Gromer v. Standard Dredging Co., cited above.

[20]See Muniments of Title.

[21]Hays v. Pacific Mail S. S. Co.; St. Louis v. Ferry Co.; Morgan v. Parham, all cited above; New York Centr. R. R. v. Miller, 202 U. S. 584; S 26:714; L 50:1155.

[22]American Refrig'r Transit Co. v. Hall, 174 U. S. 70; S 19:199; L 43:899; Union Refrig'r Transit Co. v. Lynch, 177 U. S. 149; S 20:631; L 44:708.

[23]Transportation Co. v. Wheeling; Southern Pac. Co. v. Kentucky; Ayer & Lord Co. v. Kentucky; St. Louis v. Ferry Co.; Hays v. Pacific Mail S. S. Co.; Morgan v. Parham, all cited above.

[24]Geer v. Connecticut, 161 U. S. 519; S 16:600; L 40:793: (a case dealing with game birds, but broadly applicable, it would seem).

area in question, are the property of the inhabitants, as a whole, of the area.

§ 252. Indirect Extra-Areal Power.

The principles stated in a preceding Chapter, applicable to indirect extra-areal power over real estate through power over the owner, are, in general, applicable to corporeal chattels not physically within an area in question. Thus, an area having instituted, through its Courts, an insolvency proceeding against one of its own citizens, may enjoin another of its citizens, a creditor of the estate, from carrying on, in another area, a suit, the result of which, if carried through, would be to divert to such creditor assets in such other area, of the debtor.[25]

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[25]Cole v. Cunningham, 133 U. S. 107; S 10: 269; L 33: 538.
See Domicil, Power Based Upon (§§ 220-231).

CHAPTER XLIII.

INCORPOREAL CHATTELS PROPER.[1]

§ 253. The General Principle:—Conventional Situs in the Domicil of the Owner.

A Federally adopted general principle attributes, in general, to an incorporeal chattel proper, conventional situs in the area of domicil of the owner of the chattel.[2]

§ 254. Corporate Stock:—Membership Interest in a Corporation.

1. In the absence of such action as is considered immediately below, on the part of the home area, shares of capital stock of a corporation follow the general rule, and have situs in the area of domicil of the owner.[3]

2. It is competent, however, to an area creating a corporation, to fix, upon all the shares of the capital stock, situs within such home area, regardless of extra-areal domicil of such persons as may become owners of shares. Such shares may, for example, be taxed by the home area of the corporation, and may there be reached by taxation of it in the hands of the corporation: that is to say, by a tax upon the corporation, predicated upon its capital stock.[4]

In such case, the home situs would seem to be exclusive, —upon the view that property cannot have situs in more than one place at a time.[5]

3. What has been said above is applicable, mutatis mutandis, to membership interest in a corporation which has property but has no capital stock or shares.[6]

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[1]"Proper": i. e., exclusive of chattel estates in land.
See also §§ 291, 292.

[2]Cases cited below.

[3]Hawley v. Malden, 232 U. S. 1; S 34:201; L 58:477.

[4]Corry v. Baltimore, 196 U. S. 466; S 25:297; L 49:556; New Jersey v. Anderson, 203 U. S. 483; S 27:137; L 51:284. This doctrine proceeds upon the view that such conventional situs may be made a condition and essential feature of the existence of the corporation. (See Opinions in cases cited).

[5]As to situs of shares of stock, for Federal title-clearing, see § 741.

[6]Rogers v. Hennepin County, 240 U. S. 184; S 36:265; L 60:594.

§ 255 Credits:—Generally.

In respect of credits, the general principle, above stated, leads to the result of fixing situs, in such case, in the area of domicil of the creditor.[7]

§ 256. Credits:—As a Basis for Administration of the Estate of a Creditor Decedent.

A credit owned by a decedent has conventional situs in the late domicil of the decedent, for the purposes of founding there administration of the estate.[8]

§ 257. Credits:—Garnishment.

Power of Garnishment on the part of an area in which a debtor is domiciled or is present, without regard to domicil of, or presence of, the creditor, presents no exception to the principle of situs of a credit with the creditor. Garnishment power does not rest upon the theory of situs of the credit. Garnishee Procedure is of Equitable origin, and of Equitable nature. The garnishor is subrogated to the rights of his own debtor; and, being, by subrogation, a creditor of the garnishee, he, as such creditor, may sue the latter in garnishment, wherever he may find him, without regard to domicil, or presence of, or service upon, or Jurisdiction of the area of the forum over, the garnishee's creditor,[9]—simply standing in the shoes of his (the garnishor's) debtor.[10]

In such a suit, the garnishor's debtor is a (compulsory) plaintiff, by the subrogation; and it is from that point of view that the forum has broad jurisdiction over him, by the mere garnishment suit in and of itself, and without requirement of service of process upon him.[11]

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[7]Murray v. Charleston, 96 U. S. 432; L 24:760; other cases cited below.

[8]Wyman v. Halstead, 109 U. S. 654; S 3:417; L 27:1068; New England Mut. L. Ins. Co. v. Woodworth, 111 U. S. 138; L 28:379.

Debts due from the United States have not situs in any one area for such purposes. (Case last cited).

[9]Rolling Mill Co. v. Ore & Steel Co., 152 U. S. 596; S 14:710; L 38:565; Chicago, Rock Isl. & Pac. Ry. v. Sturm, 174 U. S. 710; S 17:797; L 43:1144; King v. Cross, 175 U. S. 396; S 20:131; L 44:211; Rothschild v. Knight, 184 U. S. 334; S 22:391; L 46:573; Harris v. Balk, 198 U. S. 215; S 25:625; L 49:1023; Louisville & Nashv. R. R. v. Deer, 200 U. S. 176; S 26:207; L 50:426.

[10]Cases cited. [11]Cases cited.

As to other aspects of Garnishment, see § 598.

§ 258. Credits:—Taxation:—General Rule.

For purposes of taxation, a credit has situs in the area of domicil of the owner (that is, of the creditor)[12] and not elsewhere.[13]

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[12]Bonaparte v. Tax Court, 104 U. S. 592; L 26:845. Kirtland v. Hotchkiss, 100 U. S. 491; L 25:558; Wheeler v. New York, 233 U. S. 434; S 34:607; L. 58:1030; Bullen v. Wisconsin, 240 U. S. 625; S 36:473; L 60:830.

[13]Railroad v. Jackson, 7 Wall. 262; L 19:88. In this case, the principle of the text is recognized as fatal to the tax in question: p. 267, "Nor shall we inquire" and through the paragraph. The Court then proceed to set forth (p. 267, second paragraph) another ground of invalidity of the tax, namely, that the credits (bonds) in question were issued in block, with security in block, by a number of distinct (domestic and foreign) corporations of different areas (all acting lawfully within the taxing area in question) and that thereby, if one such area could tax such of the bonds held by a non-resident, each other such area could act correspondingly, with the result of plural taxation of all the bonds. This ground, instead of being a primary ground of invalidity of the taxation in question, would appear to be, logically, nothing but an illustration of result of departure from the principle first recognized in the Opinion: namely, that of exclusive taxing power of a credit, unsecured or secured, at the area of domicil of the creditor. If mere hardship, or plural taxation, were a test of taxing power, a considerable field, now recognized, of intra-area taxing power, would not exist.

State Tax on Foreign-Held Bonds, Case of, 15 Wall. 300; L 21:179. In this case (the situation being similar to that presented in Railroad v. Jackson, considered above) the taxing area undertook to escape the difficulty of plural taxation (relied on by the Court in the Jackson case), by pro-rating the tax, by mileage within the taxing area. The tax was, however, held invalid, as against non-residents; and thereby the Court would seem to have qualified the Opinion in the Jackson case, and to have in effect retroactively placed the decision in that case upon the general principle recognized in that case. See preceding note as to Jackson case.

Murray v. Charleston, 96 U. S. 432; L 24:760. In this case a municipal corporation of a State issued interest-bearing bonds, and subsequently undertook (under State law ante-dating the bonds) to tax them as against non-resident alien owners, on the theory (essential to the tax power) of situs of the debt—or of the credit—at the debtor's domicil; and undertook to enforce the tax by withholding interest to the tax amount. The tax ordinance was held invalid on the ground of Impairment of the obligation of the contract. A corollary of the decision (thus based) is: absence of situs of the debt, as debt, or of the credit, as credit, in the debtor's domicil: for, if there were such situs, the contract was subject to existing tax laws.

§ 259. Credits:—Taxation:—The Question of Influence of Corporeal Security.

The principle above set forth is not qualified, in respect of a credit, by the existence in an area other than that of the domicil of the creditor, of corporeal property (real or chattel) mortgaged or pledged to secure a credit in question. Thus, a State cannot (through a domestic railroad corporation) tax coupons owned by a non-resident, and secured by mortgage of the railroad.[14]

§ 260. Credits:—Taxation:—The Question of Influence of Physical Presence of Written Muniments of Title.

The general doctrine of situs in the area of domicil of the creditor is not qualified by the fact that written muniments of title of the credit are, at a given time, absent from that area, and present in another (co-ordinate) area.[15]

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[14]Railroad v. Jackson, 7 Wall. 262; L 19:88.

[15]Buck v. Beach, 206 U. S. 392; S 27:712; L 51:1106. In this case, A, residing in New York, loaned money in Ohio on notes made and payable there, and secured by Ohio land. He kept these notes in Indiana, in the hands of an agent there, whose sole duty in regard to them was to send them to an agent of A in Ohio (a) for endorsement of interest, or for payment in full, and (b) for a short period annually, including the Indiana taxing period. He kept a mere schedule of the notes, and of their movements, payments upon them, etc. The situation was not known to the Indiana authorities. It was held that the notes were not taxable under a valid back-tax law in Indiana. It was viewed as immaterial that motive of keeping them (if such was the case) in Indiana, was, to defraud Ohio or New York.

Selliger v. Kentucky, 213 U. S. 200; S 29:449; L 53:761. A warehouse receipt physically present in a State, but representing goods physically in a foreign country, held not taxable in the State. The decision is rested upon the view that taxation of the receipt would be, in effect, taxation of the goods; but that the presence of the receipt in the State did not create a (conventional) situs of the goods in the State.

Eidman v. Martinez, 184 U. S. 578; S 22:515; L 46:697; Moore v. Ruckgaber, 184 U. S. 593; S 22:521; L 46:705. The mere physical presence, in a State, of bonds owned by a non-resident alien, held not to give the credits a situs within the State, for taxation there.

Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395; S 27:499; L 51:853. A creditor had a trade domicil. His credits relating to that domicil had, thereby, (see the next succeeding section) situs there for taxation. Such trade situs was held not adversely affected, for purposes of taxation, there, by the physical absence, from the trade situs, of the written muniments of the credit (in the creditor's pos-

§ 261. Credits:—Taxation:—Plurality of Domicil: (Trade Domicil).

Where one has—within the contemplation of the general Law of Nations—a trade domicil, distinct from his personal domicil, and in a different area, a credit owned by him is, for taxation, viewed as having a situs in one or in the other of the two areas, according as it is most closely related to the personal, or to the trade, status (and so to the personal or trade domicil.)[16]

§ 262. The Same Subject Continued:—The Case of Migratory Corporations.

Application of the principle of the last preceding section is frequently presented in the case of a corporation of one area, doing business in another area, by permission of the latter area.[17]

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session at his primary domicil). In this case, the record evidently failed to present the actual situation, and the decision (adverse to the insurance company) was a result of the error. Orleans Parish v. New York L. Ins. Co., 216 U. S. 517; S 30:385; L 54:597. This error, however, of course, does not affect the decision in the earlier of the cases, upon the record as presented.

Bullen v. Wisconsin, 240 U. S. 625; S 36:473; L 60:830.

[16]Bristol v. Washington County, 177 U. S. 133; S 20:585; L 44:701. A non-resident natural person carried on, in a certain State, through an agent there, the business of loaning and re-loaning a large sum of money upon real estate there situate. He was viewed as having a trade domicil there; and the credits (the mortgage debts) held by him were held to have a (trade) situs there, for taxation there.

New Orleans v. Stempel, 175 U. S. 309; S 20:110; L 44:174. The decision in this case is in effect the same as that in the later case of Bristol v. Washington County, cited above. The reasoning of the Opinion, however, appears to be inconsistent with various decisions (subsequent to the case now in question) cited and stated in this Chapter.

Blackstone v. Miller, 188 U. S. 189; S 23:277; L 47:439; application of the principle of trade domicil, to the case of a bank deposit left for more than a year, with a view to investment to be effected in the area of the bank. As to the inter-areal Commerce aspect of this case, see its citation elsewhere.

See Burke v. Wells, 208 U. S. 14; S 28:193; L 52:370.

[17]State Board of Assessors v. Comptoir National, 191 U. S. 388; S 24:109; L 48:232; a case of loans made in a State, through an agent there, by a corporation of a foreign country, in the course of, and pursuant to, a regular course of money-lending in the State.

Scottish Union etc. Ins. Co. v. Bowland, 196 U. S. 611; S 25:345;

§ 263. Credits:—Taxation:—Plurality of Domicil:—Domicil of Quasi-Official Status.

The principle underlying the doctrine of trade domicil takes form in the matter of secondary domicil by personal status. This is illustrated in the case of executors and administrators. In general, credits owned by a decedent at his death, pass, in title, to the executor or administrator. If it happens that a person is qualified as executor or as administrator in an area other than that of his personal domicil, he acquires, there, a secondary domicil by status; and principles analogous to those of trade domicil are applicable.[18]

§ 264. Credits:—Taxation:—The Field of Comity:—Public Debt.

The principle of conventional situs of a credit with the creditor, applies, without qualification by Comity, in the case where the debtor is one of the areas in question. Thus, a State may tax, in the hands of a holder within the State, bonds of another State.[19]

L 49:619; investment bonds, owned by a foreign insurance company, admitted to, and doing business in the State, deposited, under requirement of State law, with an official of the State, for security of local policy-holders, held taxable in the State.

Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395; S 27:499; L 51:853; Liverpool etc. Ins. Co. v. Orleans Assessors, 221 U. S. 346; S 31:550; L 55:762; Orient Ins. Co. v. Orleans, 221 U. S. 358; S 31:554; L 55:769; holding local credits owned by an insurance corporation in a State other than that of domicil of the corporation, taxable in such other State, where such credits are a feature of the business there of the corporation. In respect of Metropolitan L. Ins. Co. v. New Orleans, we may suggest that the actual facts were probably the same as in Orleans Parish v. New York Ins. Co., 216 U. S. 517; S 30:385; L 54:597; and that in the Metropolitan Life case the record (as construed by the Supreme Court) failed to present the true situation, but presented the nominal loans as actual loans. See the New York Life case, p. 523. Such error, however, in the record of the Metropolitan Life case, does not qualify the legal effect of that case as supporting our text.

[18]Blackstone v. Miller, 188 U. S. 189; S 23:277; L 47:439: subjectivity there even to a death succession tax. Case cited.

[19]Bonaparte v. Tax Court, 104 U. S. 592; L 26:845.

CHAPTER XLIV.

Domestic Corporations.

§ 265. Domicil or Situs of a Corporation, as an Artificial Person.

A corporation has its domicil or situs in the area of its creation.[1]

§ 266. Internal Affairs.

1. For the purposes of the corporation, as such,[2] the home area has exclusive power over internal affairs of the corporation,[3] as: assessment upon shareholders;[4] determination of the fact, and of the particulars, of indebtedness of the corporation, for the purposes of a shareholders' personal liability;[5] or winding-up.[6]

2. We have spoken elsewhere,[7] of the principle that the area of situs of property may Judicially pass upon title thereto, but may not bind an absent non-resident to personal liability. Upon the same general principle, the power (immediately above considered) of the home area, over internal affairs of a corporation, does not extend to the fixing, upon an absent non-resident, of personal liability. Thus, where a non-resident alleged shareholder or alleged subscriber to stock is neither (a) physically present within the area, nor (b) constructively there present (on grounds other than that of alleged shareholding or subscription), the home area of the corporation has no power of adjudication of his status as a shareholder or subscriber for the purpose of fixing upon him a personal liability based upon shareholding.[8]

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[1]Cases cited below.

[2]"As such." As to this qualification, see ¶ 2, below, in this section.

[3]Hartford L. Ins. Co. v. Ibs, 237 U. S. 662; S 35:692; L 59:1165.

[4]Converse v. Hamilton, 224 U. S. 243; S 32:415; L 56:749; Selig v. Hamilton, 234 U. S. 652; S 34:926; L 58:1518.

[5]Hancock Bank v. Farnum, 176 U. S. 640; S 20:506; L 44:619; Converse v. Hamilton, 224 U. S. 243; S 32:415; L 56:749.

[6]Cases cited in this section, and in other sections of this Chapter.

[7]See § 227.

[8]Wilson v. Seligman, 144 U. S. 41; S 12:541; L 36:338; Great Western Telegr. Co. v. Purdy, 162 U. S. 329; S 16:810; L 40:986.

§ 267. Affairs not Internal, but Involving the Same Principle.

Closely akin to internal affairs, and involving a like principle, are affairs incapable of being dealt with except as a unit, and in one area,—that is to say, the home area.[9]

§ 268. Shareholders' Liability as Contractual.

Exemption of shareholders from liability for debts is not an essential feature of corporate existence; but may be non-existent, complete, or partial, in the discretion of the Sovereign creating a corporation; and, in the latter cases, a contractual relation exists between shareholders and creditor, with consequent effects (upon general principles of Contract) within and without the home area.[10]

§ 269. Situs of the Corporate Franchise.

The franchise of corporate existence has the two-fold aspect: (a) of (incorporeal) chattel; and (b) of status. As a chattel, the franchise is owned by the members of the corporation; as status, it is status of the members, collectively and individually.

In both aspects the franchise has situs in the home area; and (unless by and to the extent of permission of the home area) not elsewhere.

Its situs in the home area subjects the franchise to taxation there, regardless of the question of presence in or absence from the area, of property of the corporation.[11]

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[9]Thus, for mere convenience of construction, a railroad corporation, of extensive extra-areal interests, sought and obtained admission to an adjoining State, for a small extent of trackage. It had outstanding, in this country and abroad, a large issue of coupon bonds, payable here and abroad; and it was practically impossible to ascertain the individual holders of the coupons. In this situation, the State of small incidental mileage was not competent to force the home State to deduct from the amount of coupons (as payable) the amount of a tax upon the owners of coupons domiciled in the State of incidental mileage. Erie R. R. v. Pennsylvania, 153 U. S. 628; S 14:952; L 38:846.

[10]Converse v. Hamilton, 224 U. S. 243; S 32:415; L 56:749.

[11]New Jersey v. Anderson, 203 U. S. 483; S 27:137; L 51:284; (a State annual imposition upon the franchise of a domestic corporation held a "tax" within the meaning of a tax-preference clause of a Federal Bankruptcy Act, and held competent to the State, although all the property and business of the corporation were extra-State).

As to taxation of the franchise, from the standpoint of suprastate Commerce, see § 167.

§ 270. **Situs of the Shares of the Capital Stock.**

It is competent to an area, in the creation of a stock corporation, to fix upon and for the shares of the capital stock, a situs within the area, regardless of extra-areal domicil of owners, initial or subsequent, of shares.[12]

In such case, the home situs would seem to be exclusive, upon the view that property cannot have two or more situs at the same time.[13]

§ 271. **Power to Create a Lien Running with Shares.**

It is competent to an area, by general laws, to fix, in futuro, upon the capital stock of domestic corporations, a lien for debts of the corporation; and, in such situation, the lien follows the shares, extra-areally, in the hands of all shareholders.[14]

§ 272. **Subscriptions by Non-Residents for Capital Stock:—Assessments.**

If a non-resident subscribes for stock of a domestic corporation, the domestic law enters into the contract; and assessments (for payment of the subscription) made by the directors, pursuant to the terms of the home area, are binding upon him.[15]

§ 273. **Power of Ascertaining Indebtedness of Corporations and Power of Winding-up, Generally.**

As against all actual shareholders, resident and non-resident, the home area of a corporation has power to fix, by home Judicial procedure, the fact and the particu-

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[12]Corry v. Baltimore, 196 U. S. 466; S 25:297; L 49:556.

[13]Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; S 5:826; L 29:158 (the doing business, by a corporation, in an area other than that of its creation, does not subject the capital stock to taxation in such other area). The inter-State commerce character of the business of the corporation in question in this case, would appear not to have been material. Such character does not, in and of itself, limit State taxation of property having situs within its limits.

[14]Union Bank v. Laird, 2 Wh. 390; L 4:269; Brent v. Bank of Washington, 10 Pet. 596; L 9:547; Hammond v. Hastings, 134 U. S. 401; S 10:727; L 33:960.

Such a lien is capable of being lost by estoppel or waiver. National Bank v. Watsontown Bank, 105 U. S. 217; L 26:1039.

[15]Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221; S 23:517; L 47:782 (the question as to a given individual of actual subscription by him being left to general principles of Jurisdiction).

lars of indebtedness of the corporation, for the purposes of a shareholder's personal liability.[16]

The power extends to incidental questions, such as that of the amount of an assessment upon shareholders.[17]

The question of actual shareholder status on the part of non-resident alleged shareholders is necessarily left to be determined by general principles of Jurisdiction.[18]

§ 274. Legislative Winding-up.

From the standpoint of power of the home area of a corporation over or as against non-residents, it is immaterial whether the laws of the home area provide for a Judicial or for a Legislative winding-up.[19]

§ 275. Winding-up:—Capacity to Vest Title in a Trustee (Public or Private).

It is competent to the home area of a corporation to provide, as a feature of the incorporation, that in case of a winding-up, by home procedure, title to the property of the corporation shall vest (or shall be made to vest) in a trustee. In such case, the trustee, (under whatever designation) stands, as to title, as the successor of the corporation, and is not subject to the limitations, as to extra-areal action, to which a mere Receiver is subject; but may stand upon his title in any other area.[20]

§ 276. Winding-up:—Rights of Non-Resident Creditors.

In winding-up procedure, by an area, of a domestic corporation, non-resident creditors have the same rights as resident creditors.[21]

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[16]Hancock Bank v. Farnum, 176 U. S. 640; S 20:506; L 44:619; Converse v. Hamilton, 224 U. S. 243; S 32:415; L 56:749.

[17]Converse v. Hamilton, cited above.

[18]§ 266, ¶ 2.

[19]Canada Southern Ry. v. Gebhard, 109 U. S. 527; S 3:363; L 27:1020. (Dealing with a corporation of a Foreign nation, but here pertinent in principle).

[20]Relfe v. Rundle, 103 U. S. 222; L 26:337.

[21]Blake v. McClung, 172 U. S. 239; S 19:165; L 43:432; 176 U. S. 59; S 20:307; L 44:371.

This doctrine rests specifically, as among the States and Federal areas, upon the Organic and non-Organic Written law of Privileges and Immunities. That doctrine, however, in this application of it, is at most an enactment into operative Federal law, of a doctrine of

§ 277. Continuance of Situs, upon Change in Local Sovereignty (or in Quasi-Sovereignty).

Under a familiar principle of the Law of Nations, recognized by, and existing as, Federal law, the areal situs of a corporate status is, like other local law, not affected by change in the Sovereignty (or quasi-Sovereignty) over its area of situs; but it becomes adoptive status of the new Sovereignty or quasi-Sovereignty.[22]

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natural justice and of comity, recognized by the Law of Nations, based upon the view that the assets of an insolvent corporation belong, upon winding-up, to the creditors as a whole.

[22]Thus, a corporation created under the laws of Spain, and having local situs in Porto Rico, became, upon the Spanish cession to the United States of the Sovereignty over Porto Rico, a corporation of the United States, in and as of Porto Rico, in Porto Rico's character as a Foreign Possession of the United States. Martinez v. Asociacion de Senoras, 213 U. S. 20; S 29:327; L 53:679.

CHAPTER XLV.

Foreign Corporations, As Such.

§ 278. Admission as Matter of Discretion.

A corporation of one area cannot, as matter of general inter-areal law,[1] be forced by its home area, or force itself, upon another area; but admission is, in such case, a matter of pure discretion with each area; and the grounds and motives of its action are immaterial; and it may impose such conditions as it pleases.[2]

As an incident of its power of exclusion of foreign corporations, as such, an area may lay a franchise-tax or occupation-tax according to the amount of the whole capital stock;[3] or may require the filing of a copy of the charter with a State official, and other like action, as a condition of bringing suit in the Courts of the State.[4]

§ 279. Consent of the Home Area as Essential.

The power of an area to fix the scope and particulars of franchise of corporations of its creation, involves the corol-

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[1]I. e., apart from specific Federal law; as, that of suprastate Commerce.

[2]Paul v. Virginia, 8 Wall. 168; L 19:357; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; S 8:737; L 31:650; Hooper v. California, 155 U. S. 648; S 15:207; L 39:297; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28; S 20:518; L 44:657; Swing v. Weston Lumber Co., 205 U. S. 275; S 27:497; L 51:799; Hammond Packing Co. v. Arkansas, 212 U. S. 322; S 29:370; L 53:530. Thus, when a State refuses admission, upon the ground of action out of the State in character violative of the policy of the State, there is no attempt at assumption of extra-State power, but merely extra-State inquiry in aid of exercise of discretion. Hammond Packing Co. v. Arkansas, cited above.

[3]Horn Silver Mining Co. v. New York, 143 U. S. 305; S 12:403; L 36:164; Baltic Mining Co. v. Massachusetts, 231 U. S. 68; S 34:15; L 58:127.

[4]Interstate Amusement Co. v. Albert, 239 U. S. 560; S 36:168; L 60:439.

As to State attempt to forbid or to hamper resort (by Removal or otherwise) to a Federal Court, on the part of a foreign corporation, see §§ 661-663.

laries: (1) that a private corporation may be (and many classes of private corporations are) created without capacity to act extra-areally; and (2) that capacity so to act (by permission of any other area) must, in any case, rest upon express or presumed consent of the home area.[5]

In the case of an ordinary private trading corporation, consent of the home area is readily presumed.

§ 280. Limitation, by the Admitting Area, of the Scope of Admission or of Action.[6]

Since an area may at will exclude foreign corporations, it may, a fortiori, fix limits and conditions of their action.

A State may limit the intra-area contract power of foreign life insurance corporations, by subjecting them to a general policy of law of the State, forbidding discrimination against death by (not originally contemplated) suicide.[7]

A State may require of a foreign corporation a certain form of ratification of mortgage of land within the State,[8] or prescribe a certain pre-requisite (as, a vote of shareholders) for effectual sale, by a foreign corporation, of land in the State.[9]

An area may forbid mortgage loans by foreign corporations upon land within the area, unless after compliance with certain admission requirements, and without regard to the question whether the loan contract and the mortgage were made (as matter of fact and of law) in, or out of, the area.[10]

This principle involves the proposition that an area may effectually forbid the acquisition of land within its borders, by a foreign corporation.

§ 281. The Feature of Contract in Admission:—(a) Contract Binding upon Shareholders.

In the situation (common in practice, but exceptional in theory) in which all the shareholders in a corporation are

[5]Bank of Augusta v. Earle, 13 Pet. 519, 588, 589; L 10: 274.

[6]See also § 284.

[7]Whitfield v. Ætna L. Ins. Co., 205 U. S. 489; S 27: 578; L 51: 895.

[8]Williams v. Gaylord, 186 U. S. 157; S 22: 798; L 46: 1102.

[9]Case last cited.

[10]Chattanooga Bldg. etc. Assoc. v. Denson, 189 U. S. 408; S 23: 630; L 47: 870.

individually domiciled within the admitting area, (what is foreign area to their corporation, being thus domestic area to them as individuals), they are subject, in respect of indebtedness of the corporation, to stockholders' liability legislation of such foreign area of the corporation (their own home area).[11]

§ 282. The Feature of Contract, in Admission:—(b) as Against the Admitting Area.

An admitting area may, under certain circumstances, by admitting a foreign corporation and sanctioning action by it, bind itself in contract to the corporation in respect of right of remaining within the area.[12]

§ 283. Adverse Discrimination in Taxation.

An incident of the power of exclusion (and of fixing conditions and limitations) of foreign corporations, is the power, in general, of the admitting area, to discriminate against such corporations, as, in taxation. That is to say,

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[11]Pinney v. Nelson, 183 U. S. 144; S 22:52; L 46:125. The decision is rested by the Court upon the view of an implied contract, on the part of the shareholders, to be bound by the stockholders' liability laws of the admitting area. In this case, the charter of the corporation expressly provided for the extra-areal action in question; and that fact is emphasized in the Opinion; but there would seem to be no difference in principle between express and implied provision to such effect. The decision in this case is not rested upon the fact of domicil of the individual stockholders within the foreign area of the corporation; but that fact, being present, correspondingly limits the legal effect of the decision as precedent. There might be strong arguments for such limitation of the doctrine. The proposition that citizens of a State incorporating themselves in another State, for the express purpose of trading in their home State, do not thereby escape from stockholders' liability statutes of their home State, by no means involves, as a corollary, such liability on the part of non-residents—particularly not on the part of citizens of the State of incorporation.

The qualification in our text: "all" (the shareholders) is also based upon the facts of the case cited. In case of diversity of inhabitancy as among the shareholders, of a given period, a complication would arise, not presented in the case cited; and a distinction might possibly be drawn, and a textual limitation to the contrary in the home area's consent (whether such limitation be expressed as a feature of a specific consent or by general laws) is, pro tanto, void and inoperative.

So, Thomas v. Matthiessen, 232 U. S. 221; S 34:312; L 58:577.

[12]§ 288 and cases cited.

foreign corporations are, in general, in that field, not within the Equal Protection clause of the Fifth, and the Fourteenth, Amendment.[13]

§ 284. Power of the Admitting Area Over Contracts.[14]

As an Incident of its power of denying admission an admitting area may impose limits, at pleasure, upon contractual action of a foreign corporation, merely as such.[15]

§ 285. Taxation of Transfer of Shares.

One area may tax transfers, made within its limits, of shares of corporations of other areas.[16]

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[13]Thus, a State may exempt domestic, and not exempt foreign corporations from a succession tax (Board of Education v. Illinois, 203 U. S. 553; S 27:171; L 51:314), or tax property of a foreign corporation at a higher rate than property of domestic corporations. Philadelphia Fire Ass'n v. New York, 119 U. S. 110; S 7:108; L 30:342. See New York v. Roberts, 171 U. S. 658; S 19:58; L 43:323.

See, generally, Equal Protection of the Laws (§§497-499).

[14]See also § 280.

[15]New York L. Ins. Co. v. Cravens, 178 U. S. 389; S 20:962; L 44:1116; (State statute, as construed by State Court, held to have superseded, for life policy of foreign corporation doing business in State, the provision of the policy that law of the home State of the corporation should control).

Williams v. Gaylord, 186 U. S. 157; S 22:798; L 46:1102: an area may require of a foreign corporation a certain form of ratification of mortgage of land within the area or prescribe a certain prerequisite (as, a vote of shareholders) for effectual sale by a foreign corporation of land in the area.

Chattanooga Bldg. Assoc. v. Denson, 189 U. S. 408; S 23:630; L 47:870: a State may forbid mortgage loans by foreign corporations upon land within the State, unless after compliance with certain admission requirements, and without regard to the question whether the loan contract and the mortgage made (as matter of fact and of law) in or out of the State.

Northwestern L. Ins. Co. v. Riggs, 203 U. S. 243; S 27:126; L 51:168; no defence of misrepresentation, after one year, even if fraudulent, if the misrepresentation did not contribute to the event on which the policy becomes payable. As a condition of setting up defence of misrepresentation, the company to deposit in court, for the plaintiffs, all premiums received.

Whitfield v. Ætna L. Ins. Co., 205 U. S. 489; S 27:578; L 51:895; State statute forbidding life insurance companies to discriminate as against suicide not originally contemplated.

[16]Hatch v. Reardon, 204 U. S. 152; S 27:188; L 51:415.

§ 286. Books and Records.

While an admitting area may not disturb the possession of the books and records of the corporation, in the home area, it may create an adverse presumption from failure to produce, and (for unexplained failure) allow striking out defence, and adverse judgment.[17]

§ 287. Voluntary Withdrawal.

An admitted foreign corporation may, in general, withdraw at pleasure.[18]

Such a corporation may, however, waive (or estop itself from asserting and exercising) such right. Thus, a foreign life insurance corporation cannot, without the consent of the admitting area, withdraw, pending policies made in the area; but may be held to presence there through a State-appointed official agent.[19]

§ 288. Revocation of Admission.—Waiver or Estoppel.

Right of arbitrary exclusion, in general, of a foreign corporation, as such, involves right, in general, of revocation, at will, of the privilege.[20]

An admitting area may, however, by express or implied contract with a foreign corporation, waive, or estop itself to set up and exercise, its such right and all such other rights as are incidental to (and are dependent upon) such principal right.

Thus, where a foreign railroad corporation is admitted, and, in conformity with the terms, object, and contemplation of the admission, makes a permanent physical investment, not capable of removal, the admitting area thereby loses power of discrimination against the corporation in taxation, as between it and like domestic corporations.[21]

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[17]Consolidated Rendering Co. v. Vermont, 207 U. S. 541; S 28:178; L. 52:327; Hammond Packing Co. v. Arkansas, 212 U. S. 322; S 29: 370; L 53:530.

[18]Hunter v. Mutual Reserve L. Ins. Co., 218 U. S. 573; S 31:127; L 54:1155.

[19]Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602; S 19: 308; L 43:569.

[20]Standard Oil Co. v. Tennessee, 217 U. S. 413; S 30:543; L 54: 817.

[21]Southern Ry. v. Greene, 216 U. S. 400; S 30:287; L 54:836. The decision, in this case, is rested by the Court upon the Equal Pro-

§ 289. Definition and Tests of Presence:—Agency:—Official Agent.

1. The matter of definition of presence, in an area, of a foreign corporation, to one or to another intent, proceeds by (Federally adopted) Common Law principles, operating: either (a) in the absence of specific State law; or (b) in confluence with specific State law consistent with such principles; or (c) in control of colorable State law inconsistent with such principles.[22]

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tection-Property-Due Process clause of the Fourteenth Amendment; but the pertinency and operation of that clause to and upon the situation, depended upon the underlying consideration of contract, presented in the text. That is to say,—the taxing State could, as matter of mere inter-areal law, have refused admission; but, having granted admission, and having sanctioned fixed investment pursuant thereto, it was bound, in implied contract, not to revoke the permission.

So, when inhabitants of a State took stock in a foreign building-corporation, (admitted to the State), and borrowed money from the corporation, and secured it by a mortgage of real estate within the State, it thereupon became incompetent to the State to enact laws violative of the rights of the corporation, as thus fixed. Bedford v. Eastern Bldg. & Loan Ass'n, 181 U. S. 227; S 21:597; L 45:834.

The life of corporations of a certain State was fixed at twenty years. A corporation of another State was admitted, under general law, upon payment of an initial fee, based upon the amount of its capital stock, and invested $5,000,000 in non-removable plant, under statutory provision that foreign corporations should be subject only to such liabilities as domestic corporations. Subsequently, a new statute provided for double the annual tax on foreign, over domestic, corporations. The corporation refused to pay the tax. In a suit, not for the tax, but for ouster for refusing to pay, held: tax invalid, and statute of time of admission (so acted on) a contract of permission to stay in, twenty years, and on the same footing as domestic corporations.

American Smelting Co. v. Colorado, 204 U. S. 103; S 27:198; L 51:393.

See the following section, ¶ 2, note.

[22]The cases cited below are distinguished respectively as cases of Error to a State Court ("E to St. Ct."), or as cases of Appeal or Error from or to a Federal Court of Original Jurisdiction ("F. Ct."). Cases of the latter class are none the less, thereby, pertinent, the matter being one of Federal law.

Goldey v. Morning News, 156 U. S. 518 (F. Ct.); S 15:559; L 39:517; Conley v. Mathieson Works, 190 U. S. 406; S 23:728; L 47:1113; Geer v. Mathieson Works, 190 U. S. 428; S 23:807; L 47:1122 (F. Ct.), severally holding that where a corporation of one State has, as a given time, entered another State, the President or a Director

2. An area may, as a condition of admission, require

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of the Corporation, casually visiting such other State, upon his own affairs (Goldey case), or even residing there, but without any agency as between him and his corporation (Conley and Geer cases), is not an agent of the corporation for service of process upon him. In the Goldey case, the corporation held no property in the foreign area, and that fact was referred to in the Opinion. It could, however, not operate upon the question of agency (for the purposes of suit) of the President or Director in question,—the only question in issue.

Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602; S 19:308; L. 43:569; (E. to St. Ct.): a life-insurance corporation, having once done business in a State, and while still carrying on (by mail) policies made there, held to be still within the State for purposes of Judicial Procedure against it, under State laws, through constructive service upon a State official designated by the State law as its agent pro hac vice.

Lumbermen's Ins. Co. v. Meyer, 197 U. S. 407; S 25:483; L 49: 810; (F. Ct.): if agents are engaged within a State, in adjusting insurance policies, made in a continuous course of business, the corporation is there present, pro tanto.

Kendall v. American Automatic Loom Co., 198 U. S. 477; S 25: 768; L 49:1133; (F. Ct.): a person served upon as agent, held not such, upon the facts.

Old Wayne Life Ass'n v. McDonough, 204 U. S. 8; S 27:236; L 51:345; (E. to St. Ct.): the mere making, in its own home State (as the locus contractus) by a life insurance corporation, of policies in favor of citizens of another State, is not doing business in the latter State.

Peterson v. Chicago, R. I. & Pac. Ry., 205 U. S. 364; S 27:513; L 51:841; (F. Ct.): a railroad corporation held not doing business in a State, merely by ownership of practically the whole stock of a local railroad, and being, with the latter, part of a large system, if actual management is left to the local road: nor is a ticket agent of the local road, an agent, thereby, of the foreign corporation, although, as agent of the local corporation, he sells tickets good over the foreign corporation's road. So of employment by the two corporations of the same conductors, etc., when the employment- and payment-contract changes at crossing of the State line.

Green v. Chicago, B. & Q. Ry., 205 U. S. 530; S 27:595; L 51: 916; (F. Ct.): mere solicitation in a State, by a foreign railroad corporation, of business for its roads (all out of the State) although done through established offices in the State, held not doing business in the State.

Commercial Mut. Acc. Ins. Co. v. Davis, 213 U. S. 245; S 29:445; L 53:782; (F. Ct.): presence in a State of a physician, sent to investigate a certain claim under a policy, held to warrant a finding of its constructive presence there.

Herndon-Carter Co. v. Norris, 224 U. S. 496; S 32:550; L 56:857;

designation of, (or may itself designate) a resident agent: as, for service of Judicial process.[23]

The mere fact that presence, in an area in question, of a foreign corporation, rests, not upon permission of that area, but upon Federal right, does not alter the fact of presence; as, for ordinary Judicial Jurisdiction of the area over it.[24]

It is competent to an area to provide, by law, in futuro, that one who, within such area, holds himself out as, and acts as, agent of a foreign corporation which in truth has not been admitted, shall be personally liable upon contracts made by him professedly as agent.[25]

(F. Ct.): a corporation held, upon detailed facts, to have been doing business in a State.

St. Louis, Southwestern Ry. v. Alexander, 227 U. S. 218; S 33: 245; L. 57:486 (F. Ct.): maintenance by a railroad corporation of an office, with resident agents, for the settlement of freight claims, held to constitute doing business.

[23]Lafayette Ins. Co. v. French, 18 How. 404; L 15:451; Ex parte Schollenberger, 96 U. S. 369; L 24:853; Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304; S 10:87; L 33:341; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602; S 19:308; L 43:569; St. Mary's Petroleum Co. v. West Virginia, 203 U. S. 183; S 27:132; L 51:144.

See Hunter v. Mutual Reserve L. Ins. Co., 218 U. S. 573; S 31:127; L 54:1155: a power of attorney for service by a foreign corporation, even if irrevocable in form, held revocable as to liabilities having no relation to the State in question.

[24]International Harvester Co. v. Kentucky, 234 U. S. 579; S 34: 947; L 58:1479.

[25]Noble v. Mitchell, 164 U. S. 367; S 17:110; L 41:472.

CHAPTER XLVI.

Multi-Areal Corporate Groups.

§ 290. Definition.

Apart from special action of Congress, it is not competent to two or more areas to act jointly, in creation of a corporation;[1] but every corporation of areal (as distinguished from general Federal) creation must be of some one area, State or Federal, and must be domestic in that area, and foreign in all other areas.[2]

It is common, in practice, for a number of corporations to be formed, in and by authority of two or more areas, with a common membership, present and prospective; for a common purpose; and under the same name in each of the areas in question; and since extra-areal contractual power may be given, by any area, to its own corporations, such a group of such corporations may, like private individuals, have severally capacity to join in and incur a joint indebtedness; pool their several properties into a plant, and manage the aggregate property as a plant; jointly give a blanket mortgage to one mortgagee, or to different mortgagees of different areas; and to take formal action (as, to hold stock or directors' meetings) in block, in some one area, in the same form as if they were a single corporation;[3] and, in general, to act jointly, in the contractual field.

If a group of such corporations proceeds so far as (acting nominally and in form as a single corporation) to issue jointly certificates of shares, representing the aggregate of their capital stock, the resultant situation is of legal effectiveness, to certain intents—when not challenged directly at the proper stage.[4]

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[1] § 140. [2] Cases cited below.

[3] Clark v. Barnard, 108 U. S. 436; S 2:878; L 27:780; Graham v. Boston, Hartford, etc. R. R., 118 U. S. 161; S 6:1009; L 30:196.

[4] Graham v. Boston, Hartford, & Erie R. R., cited above; Wabash etc. Ry. v. Ham, 114 U. S. 587; S 5:1081; L 29:235; Wabash R. R. v. Adelbert College, 208 U. S. 38; S 28:182; L 52:379.

Such a corporate group is often textually characterized, by enactments of the different areas in question, as a single corporation, and is often so characterized in the language of Judicial Opinions, in cases where only contractual relations (such as have been mentioned above) are involved, or are brought in question.[5]

Fundamentally, however, there exists: not a single corporation, but a group of like corporations,—each domestic in some one area, and foreign in each of the other areas.[6]

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[5]As in Wabash R. R. v. Adelbert College, cited above.

[6]Ohio & Miss. R. R. v. Wheeler, 1 Bl. 286; L 17:130; Clark v. Barnard, cited above; Graham v. Boston, Hartford, etc. R. R., cited above; Nashua R. R. v. Lowell R. R., 136 U. S. 356; S 10:1004; L 34:363; St. Louis & San Francisco Ry. v. James, 161 U. S. 545; S 16:621; L 40:802; St. Joseph etc. R. R. v. Steele, 167 U. S. 659; S 17:925; L 42:315; Louisville, New Albany etc. Ry. v. Louisville Trust Co., 174 U. S. 552; S 19:817; L 43:1081; Southern Ry. v. Allison, 190 U. S. 326; S 23:713; L 47:1078.

CHAPTER XLVII.

MULTI-AREAL PROPERTY UNITS:—INTER-AREAL DISTRIBUTION OF VALUE FOR TAXATION.[1]

§ 291. The General Principle.

In a great number of instances, a large number of distinct pieces of property—real, or chattel, or both—are so inter-connected, in their nature, or in their actual use, as to form a unit.

Such a situation presents itself, for Judicial consideration, most commonly in the case of extensive plants, such as that of a considerable transportation corporation.

In the case of such a plant, the aggregate value is naturally greatly in excess of the aggregate value of the separate elements taken separately. Such excess value would, for purposes of taxation, be lost, if each taxing area were limited to the consideration of the elements having situs within the area. As, however, such excess value should not be treated as non-existent, it follows that each area may, for the purpose of fixing the value of the elements within such area, inquire into, and ascertain, and take into consideration, the value of the plant as a whole, and attribute to the local elements their proper share of the total value.

This principle of valuation arose—and now stands—purely as a (Federal) Judicial application of general Common Law principles of value. It is consequently—as the Federal law now stands—limited in its particulars of operation, by the generic limitation of Judicial, as distinguished from Legislative, power. In theory, it is, as the law now stands, of equal, just, and uniform operation, and leads to an aggregate of harmonious results: since it is to be presumed that each taxing area and each taxing authority will reach an accurate local valuation, and that, therefore, the aggregate of (locally ascertained) areal valuations will accurately represent the true aggregate value. The Federal Judiciary has no means of compelling

[1]See also §§ 246-252; 253-264.

uniformity of procedure, or harmony in actual valuation, as among the States and Federal areas; its power is limited to determination, in the case of the areas, severally, of the question of natural tendency of local Procedure (if fairly administered) to a just result. Uniformity of Procedure and of valuation is capable of being provided for only by action of Congress.

As the matter now stands, it is necessary to validity of action, of any area, only that there shall be a reasonable attempt at fairness; and when there appears to be such a reasonable attempt, the areas in question are to be viewed by the Federal law as at liberty respectively to determine a scheme of Procedure.

§ 292. Illustration.

The law of any area in question may, for example, proceed on a basis of mileage, or length (as, of railroad trackage, of telegraph wire, or of express routes);[2] or of local gross receipts;[3] or by the respective lengths of the two intra-area component portions of an inter-area bridge;[4] or by aggregate net receipts;[5] (but not by aggregate gross receipts).[6]

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[2]Delaware R. R. Tax, 18 Wall. 206; L 21:888; Western Un. Tel. Co. v. Massachusetts, 125 U. S. 530; S 8:961; L 31:790; Pullman Car Co. v. Pennsylvania, 141 U. S. 18; S 11:876; L 35:613; Massachusetts v. Western Un. Tel Co., 141 U. S. 40; S 11:889; L 35:628; Pittsburgh etc. Ry. v. Backus, 154 U. S. 421; S 14:1114; L 38:1031; Cleveland, Cinn. etc. Ry. v. Backus, 154 U. S. 439; S 14:1122; L 38:1041; Postal Tel. Cable Co. v. Adams, 155 U. S. 688; S 15:268; L 39:311; Erie R. R. v. Pennsylvania, 158 U. S. 431; S 15:896; L 39:1043; Western Un. Tel. Co. v. Taggart, 163 U. S. 1; S 16:1054; L 41:49; Adams Ex. Co. v. Ohio, 165 U. S. 194; S 17:305; L 41:683; Adams Ex. Co. v. Kentucky, 166 U. S. 171; S 17:527; L 41:960; Michigan Centr. R. R. v. Powers, 201 U. S. 245; S 26:459; L 50:744; Chicago, B. & Q. Ry. v. Babcock, 204 U. S. 585; S 27:326; L 51:636.

[3]United States Ex. Co. v. Minnesota, 223 U. S. 335; S 32:211; L 56:459.

[4]Henderson Bridge Co. v. Kentucky, 166 U. S. 150; S 17:532; L 41:953.

[5]Maine v. Grand Trunk Ry., 142 U. S. 217; S 12:121; L 35:994.

[6]State Freight Tax, 15 Wall. 232; L 21:146; Fargo v. Michigan, 121 U. S. 230; S 7:857; L 30:888; Philadelphia S. S. Co. v. Pennsylvania, 122 U. S. 326; S 7:1118; L 30:1200; (overruling, in effect, State Tax on Gross Ry. Receipts, 15 Wall. 284; L 21:164); Western Un. Tel. Co. v. Alabama, 132 U. S. 472; S 10:161; L 33:409; Okla-

An area need, on the other hand, adopt no such specific basis, but may leave the specific method of apportionment to the judgment of the taxing authorities, based upon their view of extra-area and intra-area conditions, generally.[7]

The principles in question are applicable alike to domestic and to foreign corporations.[8]

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homa v. Wells Fargo & Co., 223 U. S. 298; S 32:218; L 56:445; Fargo v. Hart, 193 U. S. 490; S 24:498; L 48:761; Galveston etc. Ry. v. Texas, 210 U. S. 217; S 28:638; L 52:1031; Ohio Tax Cases, 232 U. S. 576; S 34:372; L 58:737; St. Louis Southw. Ry. v. Arkansas, 235 U. S. 350; S 35:99; L 59:265; Cornell Steamboat Co. v. Sohmer, 235 U. S. 549; S 35:162; L 59: 355; Equitable Life Ass. Soc'y v. Pennsylvania, 238 U. S. 143; S 35:829; L 59:1239.

[7]Adams Ex. Co. v. Ohio, 165 U. S. 194; 166 U. S. 185, cited above; Western Un. Tel. Co. v. Gottlieb, 190 U. S. 412; S 23:730; L 47: 1116.

[8]Cases cited above.

PART II.

WRITTEN (OR PARTLY WRITTEN, PARTLY UNWRITTEN) LAW.[1]

[1]As to Faith and Credit, see Chapters 109, 110 (§§ 644 to 652).

CHAPTER XLVIII.

Privileges and Immunities.[1]

§ 293. Affirmative Operation of the Texts Cited:—Illustration.

The texts establish right to sue in an area other than one's own, as an inhabitant of such area may sue.[2]

They forbid arbitrary and unreasonable adverse discrimination generally.[3]

§ 294. Qualificatory Features of Definition:—Illustration.

Like other Constitutional and Congressional texts, in general, the texts cited are to be read in the light of, and qualified by, general Common Law principles, and in view of practical considerations.

Thus, it is competent to a State to fix, in respect of property within the State, relations between husband and wife domiciled in the State; and to limit the provision to persons so domiciled.[4]

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[1]Const., Art. IV, § 2:—

> The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Act of May 31, 1870 (Rev. Stat., § 1977):—

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[2]Harris v. Balk, 198 U. S. 215, 223; S 25:625; L 49:1023 (upon the Constitutional text).

[3]Blake v. McClung, 172 U. S. 239; 176 U. S. 59; S 19:165; L 43:432; Darnell & Son v. Memphis, 208 U. S. 113; S 28:247; L 52:413.

[4]Conner v. Elliott, 18 How. 591; L 15:497.

See Chambers v. Baltimore & O. R. R., 207 U. S. 142; S 28:34; L 52:143.

A State may require, of a newly-domiciled inhabitant, residence of a reasonable length, as a pre-requisite of registration and voting.[5]

The texts do not extend to the field of public office or employment.[6]

An area may, at its pleasure, entertain or decline to entertain a transitory action arising without the State,[7] or a suit between two corporations, both of a certain other area,[8] even upon a judgment of the latter area.[9]

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[5]Pope v. Williams, 193 U. S. 621; S 24:573; L 48:817 (residence of one year). See other citations of the case. The matter is mentioned at this point as possibly pertinent from the standpoint of privilege of acquiring State citizenship.

[6]Heim v. McCall, 239 U. S. 175; S 36:78; L 60:206 (validity of State statute limiting to citizens of the United States, and with preference of citizens of the State, employment upon public works).

Numerous other cases in which one or the other of the texts cited might have been invoked, have turned upon a more specific Federal ground, as, that of suprastate Commerce. See under that head, and under other specific heads.

[7]Chambers v. Baltimore & O. R. R., cited above. See St. Louis, Iron Mtn. etc. Ry. v. Taylor, 210 U. S. 281, 285; S 28:616; L 52:1061.

[8]Anglo-American Provision Co. v. Davis Provision Co. (No. 1), 191 U. S. 373; S 24:92; L 48:225.

[9]Case last cited: (the Faith and Credit texts having no operation to create jurisdiction, but only to enforce exercise of Judicial jurisdiction, when existing. See Faith and Credit (§ 647).

CHAPTER XLIX.

INTER-AREAL EXTRADITION.[1]

§ 295. Nationalization of the Matter.

In the Act above cited, the term "Territory" is used in the broad sense,[2] including Federal States generally,[3] and the field is therefore nationalized,—a State being entitled to Extradition from a Federal State,[4] and a Federal area from a State.[5]

§ 296. Non-Limitative Aspect.

The texts in question leave, untouched, principles of the Law of Nations inherently applicable as among States and Federal areas. Thus, competency (otherwise existing), of a State, to try an offender, is not annulled by the

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[1]Const., Art. IV, § 2:—

> A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

Rev. Stats., § 5278:—

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from which the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.

[2]§ 53. [3]Kopel v. Bingham, 211 U. S. 468; S 29: 190; L 53: 286.

[4]Ex parte Reggel, 114 U. S. 642; S 5:1148; L 29:250.

[5]Kopel v. Bingham, cited above.

fact of forcible abduction of such person into such State, from an extra-State area.[6]

So, the demanding area is not limited to the alleged offence upon which Extradition was effected, but may try for a different offence;[7] or, upon acquittal, may yield up, on Extradition from a third area.[8]

§ 297. The Question of Flight.

1. The first essential of flight is: that the accused have been physically in the area of proposed trial. Constructive presence is not sufficient.[9]

2. The physical presence must have been in connection with the alleged crime: mere subsequent presence, not related to the crime or to the prosecution, is not a basis for flight, within the texts cited.[10]

3. Physical departure is sufficient to constitute flight: the state of mind, or motive, of the accused, in respect of his departure, are immaterial.[11]

§ 298. Guilt not in Issue.

In the field now in question, the matter of guilt is not in issue, but only the question of presence and flight (within the sense above considered, of flight).[12]

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[6]Ker v. Illinois, 119 U. S. 436; S 7:225; L 30:421; Mahon v. Justice, 127 U. S. 700; S 8:1204; L 32:283; Cook v. Hart, 146 U. S. 183; S 13:40; L 36:934.

So, of action under formal Extradition papers, in such manner as is designed to prevent the accused (in fact, not a fugitive from justice) from applying for habeas corpus (and from thereby availing himself of that fact) in the State of arrest. Pettibone v. Nichols, 203 U. S. 192; S 27:111; L 50:148.

[7]Lascelles v. Georgia, 148 U. S. 537; S 13:687; L 37:549.

[8]Innes v. Tobin, 240 U. S. 127; S 36:290; L 60:562.

[9]Hyatt v. Corkran, 188 U. S. 691; S 23:456; L 47:657.

[10]Hyatt v. Corkran, cited above.

[11]Appleyard v. Massachusetts, 203 U. S. 222; S 27:122; L 51:161; Massing v. Cady, 208 U. S. 386; S 28:392; L 52:540; Drew v. Thaw, 235 U. S. 432; S 35:137; L 59:302.

[12]Roberts v. Reilly, 116 U. S. 80; S 6:291; L 29:544; Munsey v. Clough, 196 U. S. 364; S 25:282; L 49:515; Matter of Strauss, 197 U. S. 324; S 25:535; L 49:774; McNichols v. Pease, 207 U. S. 100; S 28:58; L 52:121; Strassheim v. Daily, 221 U. S. 280; S 31:558; L 55:735; Drew v. Thaw, cited above.

§ 299. Administrative, not Judicial, Character.

The action of an Executive, in the field in question, is of Administrative, not of Judicial, character. This is shown by absence of necessity of notice to the accused.[13]

While, however, the duty of an Executive is of Administrative character, it is not purely ministerial, but involves the exercise of judgment; and Executive action in this field is not subject to Federal Judicial control.[14]

It is, however, in the absence of Congressional provision to the contrary, competent to a State or a Federal State to provide for Judicial review in its own Courts (in matter of law) of action of its own Executive in this field.[15]

§ 300. Mere Criminal Pleading not Material.

A question of sufficiency of Pleading as such (in an Indictment or Complaint set forth) is not a material issue.[16]

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[13]Pearce v. Texas, 155 U. S. 311; S 15:116; L 39:164; Marbles v. Creecy, 215 U. S. 63; S 30:32; L 54:92.

[14]Kentucky v. Dennison, 24 How. 66; L 16:717; Drew v. Thaw, 235 U. S. 432; S 35:137; L 59:302.

[15]Robb v. Connolly, 111 U. S. 624; S 4:544; L 28:542; Ex parte Reggel, 114 U. S. 642; S 5:1148; L 29:250; Munsey v. Clough, 196 U. S. 364; S 25:282; L 49:515.

[16]Ex parte Reggel; Pearce v. Texas; Pierce v. Creecy, all cited above.

BOOK IV.

CERTAIN PRINCIPLES OF GENERAL (AND, PRIMARILY, OF PUBLIC), CHARACTER.

PART I.—PRINCIPLES PRIMARILY OF PUBLIC CONCERN.

PART II.—PRINCIPLES PRIMARILY OF PRIVATE CONCERN.

PART I.

PRINCIPLES PRIMARILY OF PUBLIC CONCERN.

CHAPTER L.

FEDERAL CITIZENSHIP.[1]

§ 301. General Principles.

The term "the United States," in the text cited, intends the United States proper, intra-State and extra-State, exclusive of Foreign Possessions of the United States.[2]

The text is tacitly controlled by the Federal law and polity of Federal Paramount Sovereignty over and in respect of Indian Tribes, and members of such Tribes, and does not operate upon Tribal Indians.[3]

The text extends to children born within the United States proper, of alien parents,[4] even where the parents are at the time disqualified (as, by race) from acquisition of citizenship, in the ordinary course of naturalization.[5]

The text is to be read in the light of the general Law of Nations, and is broadened, and narrowed, in one and in another particular, by that law. Thus, on the one hand, it includes children born abroad, of parents themselves within certain classes (defined by the Law of Nations) of Federal Diplomatic officials; and, e converso, does not intend to cover the case of children born here of foreign parents holding a like Diplomatic status here.

The extension of the text by the Law of Nations, (or by other Unwritten law), does not include the case of a minor child, born and still residing abroad, upon naturalization here, (after the birth of the child), of the father.[6]

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[1]As to the inception of Federal citizenship (in and by the Declaration of Independence) see the latter head.

Fourteenth Amendment:—

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States * * *.

[2]§ 81.

[3]Elk v. Wilkins, 112 U. S. 94; S 5:41; L 28:643.

[4]United States v. Wong Kim Ark, 169 U. S. 649; S 18:456; L 42:890.

[5]United States v. Wong Kim Ark, cited above.

[6]Zartarian v. Billings, 204 U. S. 170; S 27:182; L 51:428.

An alien woman, capable of naturalization, becomes, by Congressional provision, a citizen of the United States upon marriage to a citizen.[7]

Naturalization of a man, operates, by statute, to naturalize his wife, if she be of a class capable of naturalization.[8]

Formerly, marriage of a woman—a citizen of the United States,—to a non-resident alien, did not annul her citizenship;[9] but now, by Act of Congress, a woman citizen marrying an alien is expatriated.[10] Federal citizenship of one domiciled within a State, makes such person a citizen of the State;[11] but does not, in and of itself entitle him (though of full age) to suffrage franchise within the State,[12] but he cannot be excluded from the State voter class, or be limited, within such class, on account of race, color, or previous condition of servitude,[13] or by State provisions unequal, as against him, within the Federal conception of Equality before the law.[14]

Federal citizenship does not involve admission to jury service, within a State,[15] provided there is no exclusion by reason of race or color, or by other denial of Equal Protection of the Laws.[16]

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[7]See Kelly v. Owen, 7 Wall. 496; L 19:283.

[8]Kelly v. Owen, cited above.

[9]Shanks v. Dupont, 3 Pet. 242, 246; L 7:666. (In this case, the husband was personally present here, but only in the course of his service as a British Army officer).

[10]Mackenzie v. Hare, 239 U. S. 299; S 36:106; L 60:297.

[11]Fourteenth Amendment.

[12]Minor v. Happersett, 21 Wall. 162; L 22:627 (women); United States v. Reese, 92 U. S. 214; L 23:563; (persons of the African race).

[13]Fifteenth Amendment. Guinn v. United States, 238 U. S. 347; S 35:926; L 59:1340; Myers v. Anderson, 238 U. S. 368; S 35:932; L 59:1349; (cases of so-called "Grandfather" restriction upon voting).

[14]Fourteenth Amendment; Equal Protection clause (§ 499).

[15]Gibson v. Mississippi, 162 U. S. 565; S 16:904; L 40:1075; Smith v. Mississippi, 162 U. S. 592; S 16:900; L 40:1082; Brownfield v. South Carolina, 189 U. S. 426; S 23:513; L 47:882; Martin v. Texas, 200 U. S. 316; S 26:338; L 50:497; Franklin v. South Carolina, 218 U. S. 161; S 30:640; L 54:980.

[16]Strauder v. West Virginia, 100 U. S. 303; L 25:664; Virginia v. Rives, 100 U. S. 313; L 25:667; Ex parte Virginia, 100 U. S. 339; L 25:676; Bush v. Kentucky, 107 U. S. 110; S 1:625; L 27:354.

It is not competent to Congress to forbid private differentiation within a State, as among citizens of the United States, in inns, and the like, by race or color.[17]

§ 302. Power of Congress in Respect of Admission to Citizenship.

The Constitution[18] provides for power in Congress "to establish an uniform rule of naturalization."

This text undertakes to deal only with power of Congress. The Federal power, as a whole, (including Federal action other than Congressional), is not touched upon by the text, one way or the other. Thus, in and by the proceedings (in part, of Treaty character; in part of Congressional character), of admission into the Union, of Texas, (immediately prior thereto, a Foreign nation) the whole body of citizens were made, eo facto, citizens of the United States.[19]

§ 303. Federal Power of Vacating Naturalization.

Under general principles, it is competent to the United States to vacate—under certain general limitations of Procedure—citizenship once granted. In particular, it is competent to Congress to provide for vacating, by Judicial Procedure, of naturalization effected, in the ordinary way, by Judicial Procedure.[20]

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[17]Civil Rights Cases, 109 U. S. 3; S 3:18; L 27:835.

For a case of Criminal pleading, bad for vagueness, in the field in question, see United States v. Cruikshank, 92 U. S. 542; L 23:588.

[18]Art. I, § VIII.

[19]Boyd v. Thayer, 143 U. S. 135, 169; S 12:375; L 36:103.

[20]Johannessen v. United States, 225 U. S. 227; S 32:613; L 56:1066.

CHAPTER LI.

ALIENS, AS SUCH.[1]

§ 304. The General Principle.

The matter of dealing with aliens, within the jurisdiction of a given nation, is matter of the Law of Nations. As such, it falls, in the Federal system, within the scope of the Federal Sovereignty, within, as outside of, State area. Thus, the United States may refuse admission into a State,[2] and, a fortiori, into Federal area. It may refuse re-admission, after departure.[3] It may deport aliens.[4]

It may deliver up, to a Foreign public vessel of war, a deserter from the vessel.[5]

The question of the status of an individual, as citizen or as alien, is matter of the Law of Nations, and, as such, is matter of Federal law, actual or potential.[6]

The question of Commercial (Foreign) Domicil is matter of the Law of Nations; and, as such, is matter of Federal law, actual or potential.[7]

The United States may, in Judicial Procedure, intervene to represent aliens, in respect of their interests.[8]

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[1]As to grand jury; jury trial in Criminal cases; Due Process; Equal Protection, etc., see under those heads.

[2]Turner v. Williams, 194 U. S. 279; S 24:719; L 48:979; other cases cited below.

[3]Wan Shing v. United States, 140 U. S. 424; S 11:729; L 35:503; Lapina v. Williams, 232 U. S. 78; S 34:196; L 58:515.

[4]Low Wah Suey v. Backus, 225 U. S. 460; S 32:734; L 56:1165; other cases cited below.

The power of exclusion and of deportation extends to the case of the wife of a citizen of the United States, at least when she is a member of a class not capable of naturalization by ordinary procedure as the Federal law stands at the time. Low Wah Suey v. Backus, cited above (a case of deportation, but applicable, a fortiori, to exclusion.)

[5]Tucker v. Alexandroff, 183 U. S. 424; S 22:195; L 46:264.

[6]United States v. Repentigny, 5 Wall 211; L 18:627.

[7]Friendschaft, The, 3 Wh. 14; L 4:322; Dos Hermanos, The, 2 Wh. 76; L 4:189.

[8]The Antelope, 10 Wh. 66; L 6:268 (suit in a Federal Court).

§ 305. Political-Law Aspect.

The Federal power over alienage is within the domain of Political law, and thereby is primarily, and in general, within the Executive, and not the Judicial, field. The power may be exercised by the Treaty-making authority;[9] or by Congress;[10] subject to dominance (in so far as it may be in a given situation, dominant) of the Treaty-making authority.

The primarily Executive character of the field of alienage is illustrated in the power and the practice of vesting in Executive officials (by Treaty, or by Act of Congress), of Legislative power of a considerable degree of importance,[11] and of broad and final Executive power of Judicial character over law and fact, extending even to the strictly Jurisdictional question of existence of Federal citizenship, at least where there is no presumption in favor of such citizenship.[12]

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[9]Tucker v. Alexandroff, cited above; other cases cited below.

[10]Cases cited below.

[11]Fok Yung Yo, 185 U. S. 296; S 22:686; L 46:917 (Rules of importance, made and promulgated by the Secretary of State).

[12]Lem Moon Sing v. United States, 158 U. S. 538; S 15:967; L 39:1082.

Illustrative decisions may be cited as follows:

Congress may put upon foreign merchant vessels and their owners the duty of ascertaining, by medical examination, the physical and mental condition of immigrants, and of not bringing in immigrants of certain physical or mental disqualifications; and may vest in the Executive, power of medical examination, and of verification thereby of the exercise of this duty; the power of final Executive determination of the fact of the breach of such duty; and the power of imposition of a pecuniary penalty in case of breach of duty so determined. Oceanic Nav. Co. v. Stranahan, 214 U. S. 320; S 29:671; L 53:1013.

Congress may penalize the holding here, by a vessel-owner, of money or security taken abroad for return passage of aliens in case of deportation. United States v. Nord Deutscher Lloyd, 223 U. S. 512; S 32:244; L 56:531.

See also Chinese Exclusion Case, 130 U. S. 581; S 9:623; L 32:1068; Wan Shing v. United States, 140 U. S. 424; S 11:729; L 35:503; Nishimura v. United States, 142 U. S. 651; S 12:336; L 35:1146; Fong Yue Ting v. United States, 149 U. S. 698; S 13:1016; L 37:905; United States v. Gue Lim, 176 U. S. 459; S 20:415; L 44:544; Li Sing v. United States, 180 U. S. 486; S 21:449; L 45:634; Low Wah Suey v. Backus, 225 U. S. 460; S 32:734; L 56:1165.

CHAPTER LII.

STATE VOTERS AS, FOR FEDERAL MATTERS, A FEDERAL OFFICIEL.[1]

§ 306. The General Principle.

The United States does not maintain, for general Federal

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[1]Const., Art. I, § 2:—

The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

Art. I, § 4:—

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

Twelfth Amendment:—

Each State shall appoint, in such manner as the legislature thereof may direct [electors of President and Vice-President].

Fourteenth Amendment:—

* * * when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. * * *

Fifteenth Amendment:—

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Rev. Stats., § 5507:

Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats or refusing to renew leases, or contracts

matters,[2] a separate and independent voter-class of its own; but adopts—as and for its general voter-class—the aggregate voter-classes established by the States respectively for election of members of the most numerous branch of the State Legislature. Subject to Federal limitations fixed by the Constitutional texts above cited, and by other provisions (of more general character) of the Federal Organic law,[3] such State voter-class is selected in each State, at pleasure, by standards[4] widely varying as among the States; is not necessarily limited to citizens of the United States, but may include aliens, while excluding citizens of the United States; may be a small minority of the aggregate inhabitancy of the State; is vested with a trust and a duty precisely corresponding to its powers;[5] is, thereby, a representative body (in State matters) of the aggregate citizenship of the State; is, thereby, a State officiel; is, in Federal matters, representative of the aggregate citizenship of the United States, intra-State and extra-State; and is, thereby, pro tanto, a Federal officiel.[6]

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for labor, or by threats of violence to himself or family, shall be punished * * *.

[2]I. e., apart from local affairs of self-governing Federal States.

[3]E. g., the Equal Protection-clause of the Fourteenth Amendment.

[4]As, of age, sex, education, intelligence, property, tax-payment, length of residence within the State, (Pope v. Williams, 193 U. S. 621; S 24:573; L 48:817), registration, or citizenship.

[5]Such trust and duty being evidenced in Federal punishment of bribery, etc.

[6]See § 150.

In Giles v. Harris, 189 U. S. 475; S 23:639; L 47:909, the State voting laws under which a Federal citizen sought to be registered as a voter by Federal decree, were, on the petitioner's own showing, invalid (see at pp. 486, 487). See the Dissenting Opinion.

CHAPTER LIII.

Allotment of Powers As Among the Three Great Branches, Legislative, Executive, and Judicial.

§ 307. General View.

In adopting from State Written Constitutions,[1] the scheme and the text of allotment and distribution of power as among the three great Branches—Legislative, Executive, and Judicial—the Constitution of the United States tacitly adopted the Common Law conception and qualifications underlying such State Constitutional texts; and the distribution and allotment of powers is, therefore, not absolute and rigid, but is subject to a considerable degree of departure from completeness and exhaustiveness.[2]

§ 308. Legislative Power in the Executive Branch.

1. Executive officials may, within certain reasonable limits, be vested by Congress with power to make rules and regulations having the force of law.[3]

It is not essential that such a rule or regulation be of formal Written character; it may exist merely as matter of Department usage.[4]

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[1]See Comparative Table (Appendix).

[2]See succeeding sections.

As to Judicial Power of inquiry into Congressional Procedure, see United States v. Ballin, 144 U. S. 1; S 12:507; L 36:321 (method of ascertainment of quorum).

[3]United States v. Bailey, 9 Pet. 238; L 9:113; Ex parte Reed, 100 U. S. 13; L 25:538; McDaid v. Oklahoma, 150 U. S. 209; S 14:59; L 37:1055; Caha v. United States, 152 U. S. 211; S 14:513; L 38:415; In re Kollock, 165 U. S. 526; S 17:444; L 41:813; Boske v. Comingore, 177 U. S. 459; S 20:701; L 44:846; Steinmetz v. Allen, 192 U. S. 543; S 24:416; L 48:555; Buttfield v. Stranahan, 192 U. S. 470; S 24: 349; L 48:525; Haas v. Henkel, 216 U. S. 462; S 30:249; L 54:569; United States v. Grimaud, 220 U. S. 506; S 31:480; L 55:563; Light v. United States, 220 U. S. 523; S 31:485; L 55:570; United States v. Birdsall, 233 U. S. 223; S 34:512; L 58:930; United States v. Foster, 233 U. S. 515; S 34:666; L 58:1074; United States v. Smull, 236 U. S. 405; S 35:349; L 59:641. As to United States v. Eaton, 144 U. S. 677; S 12:764; L 36:591, see below.

[4]Cases cited.

A rule or regulation of this character may extend into the field of Penal or of Criminal law, to the extent of bringing within the operation of general Penal or Criminal law, acts which, but for such rule or regulation, would not be within the scope of such law.

Thus, falsifying an affidavit required by formal rule, or by usage, by a Department, constitutes perjury, within Federal general perjury legislation, although such affidavit be not provided for by general law.[5]

The principle does not, we may assume, extend to the creation of generically new Penal acts or Crimes.[6]

2. The actual operation of an Act of Congress may, within certain limits, be conditioned by Congress upon Executive action,[7] even where the finding is to go beyond mere facts, and is to involve judgment; (e. g., as to reasonableness of, or as to effect of, duties imposed by other countries on products of the United States).[8]

3. Congress may delegate to the Executive Branch power of fixing the value of foreign coin, for the purposes of revenue computation,[9] and of establishing Harbor Lines.[10]

§ 309. Judicial Power in The Executive Branch.

Potential vesting of Judicial power in the Executive Branch may be illustrated as follows:—

Congress, in placing upon Foreign merchant vessels and their owners the duty of ascertaining, by medical examination, the physical and mental condition of immigrants, and of not bringing in immigrants of certain physical or

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[5]United States v. Bailey; Caha v. United States, cited above.

[6]In United States v. Eaton, (commented upon in Caha v. United States, at p. 519), a certain rule or regulation was held invalid. The decision is capable of being rested either (a) upon the ground suggested in the text, or (b) upon the ground that there was no Congressional authority for it; that is, upon a mere interpretation of an Act of Congress.

[7]E. g., upon a Proclamation by the President of certain facts or conditions as ascertained and determined by him. Cargo of Brig Aurora v. United States, 7 Cr. 382; L 3:378; Field v. Clark, 143 U. S 649; S 12:495; L 36:294.

[8]Field v. Clark, cited above.

[9]Collector v. Richards, 23 Wall. 246; L 23:95; Haddon v. Merritt, 115 U. S. 25; S 5:1169; L 29:333.

[10]Philadelphia Co. v. Stimson, 223 U. S. 605; S 32:340; L 56:570.

mental disqualifications, may vest in the Executive Branch a final power of mental examination and a verification thereby of the exercise of this duty,[11] and exclusive power of adjudging and imposing, as against a ship-master, a pecuniary penalty for breach of duty as so determined,[12] provided,[13] there is some evidence to support the finding.

When a citizen of the United States—even a native-born citizen—has left the country and desires to re-enter it, he is subject, by Act of Congress, to final Executive Jurisdiction over the question of actual citizenship (as a condition of right of entrance),[14] at least when such citizen is of a race whose members are prima facie neither citizens nor capable of naturalization under general laws.[15]

Under the Alien Immigration Acts, the question of personal convictions of an alien (as in the case of an anarchist) is placed by Congress within the final determination of the Executive,[16] provided there is some evidence.[17]

A similar power exists (and presumably to the same extent) in the matter of Deportation under the Alien Contract Labor legislation.[18]

The Land Department is vested with extensive Judicial power. In respect of questions of fact, closely related to the Federal Public Land Policy, this power is final.[19]

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[11]Nishimura v. United States, 142 U. S. 651; S 12:336; L 35:1146; Zartarian v. Billings, 204 U. S. 170; S 27:182; L 51:428; Oceanic Nav. Co. v. Stranahan, 214 U. S. 320; S 29:671; L 53:1013.

[12]Oceanic Nav. Co. v. Stranahan, cited above.

[13]Cases cited.

[14]United States v. Ju Toy, 198 U. S. 253; S 25:644; L 49:1040.

[15]This qualification is inserted for the reason that no broader situation was before the Court in the case cited; but logically all citizens would seem to have equal rights.

[16]Turner v. Williams, 194 U. S. 279; S 24:719; L 48:979; Zaconaite v. Wolf, 226 U. S. 272; S 33:31; L 57:218.

[17]Cases cited.

[18]Pearson v. Williams, 202 U. S. 281; S 26:608; L 50:1029.

[19]Knight v. United States Land Ass'n, 142 U. S. 161; S 12:258; L 35:974; Noble v. Union River Logging R. R., 147 U. S. 165; S 13:271; L 37:123; Burfenning v. Chicago, St. Paul etc. Ry., 163 U. S. 321; S 16:1018; L 41:175; Johnson v. Drew, 171 U. S. 93; S 18:800; L 43:88; Gardner v. Bonestell, 180 U. S. 362; S 21:399; L 45:574; Kirwan v. Murphy, 189 U. S. 35; S 23:599; L 47:698; Gertgens v. O'Connor, 191 U. S. 237; S 24:94; L 48:163; Small v. Rakestraw, 196 U. S. 403; S 25:285; L 49:527; Estes v. Timmons, 199 U. S. 391;

So in respect even of general questions of fact arising collaterally to a land issue proper.[20]

Upon questions of law, this power is, in certain classes of cases, final.[21]

Under the national banking Acts, the Executive Department has extensive Judicial powers: as, to appoint a Receiver, and to make assessment upon stockholders,[22] although those matters are, in their nature, and historically, matters of Equity Jurisprudence.[23]

The Executive Branch may be vested by Congress with power to pass with finality upon the construction of a private Bounty Act.[24]

Revenue officials may be vested with final power of determining the producing power of a manufacturing plant.[25]

The Post-Office Department is vested with minor Judicial power in a variety of forms.[26]

In the field of Eminent Domain, Congress may delegate to the Executive Branch finality of power to determine the necessity or propriety of taking certain land within a State, by Eminent Domain, for public purposes.[27]

Congress may delegate to the Secretary of War power to decide, under certain principles, whether a bridge is an ob-

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S 26:85; L 50:241; Plested v. Abbey, 228 U. S. 42; S 33:503; L 57:724.

[20]E. g., in respect of side-lines of land to which public lands might be attached (Haydel v. Dufresne, 17 How. 23; L 15:115); and upon questions of fact involved in, and controlling upon, the question of domicil of an entryman. Small v. Rakestraw, cited above.

[21]Haydel v. Dufresne, cited above.

[22]Kennedy v. Gibson, 8 Wall. 498; L 19:476; Casey v. Galli, 94 U. S. 673; L 24:168; United States v. Knox, 102 U. S. 422; L 26:216; Bushnell v. Leland, 164 U. S. 684; S 17:209; L 41:598. See In re Chetwood, 165 U. S. 443; S 17:385; L 41:782.

[23]In re Chetwood, cited above.

[24]Decatur v. Paulding, 14 Pet. 497; L 10:559.

[25]United States v. Ferrary, 93 U. S. 625; L 23:832.

[26]E. g., as to interpretation of an Act of Congress, in respect of definition of "books" (Smith v. Hitchcock, 226 U. S. 53; S 33:6; L 57:119), and of "periodicals" (Bates & Guild Co. v. Payne, 194 U. S. 106; S 24:595; L 48:894). So, in respect of findings of fact, as between rival claimants of letters. Central Trust Co. v. Central Trust Co., 216 U. S. 251; S 30:341; L 54:469. See Degge v. Hitchcock, 229 U. S. 162; S 33:639; L 57:1135.

[27]Chappell v. United States, 160 U. S. 499; S 16:397; L 40:510.

struction to navigation; and to require removal or modification.[28]

Near the outer limits of the field of Executive competency of Judicial power, there is a debatable ground, in which Executive action may be given a certain scope, with prima facie finality, but subject to review by the Judicial Branch.[29]

The exercise of Judicial power, in certain of the Executive Departments, is carried on with elaborate Judicial forms of Original and of Appellate Tribunals.[30]

In respect of the Land Office, and the Patent Office, and, generally, of public sales, grants, or bounties, the vesting of Judicial power in the Executive Branch may be rested upon the proposition that the Executive machinery in question is of a status akin to that of trustees under a deed or a will,—in whom power of a Judicial nature may, under general principles, be vested within certain limits.[31]

§ 310. Legislative Power in the Judicial Branch.

Minor Legislative power in the Judicial Branch is seen in Rules of Court (often of broad and important operation, as in the Admiralty and Equity rules); and in the power vested in the Courts of the United States of adoption of State Procedure law, with adaptations and modifications.[32]

Legislative power in the Judicial Branch is seen, in a highly important form, in the Congressional power and practice (following Common Law usage) of employment

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[28]Union Bridge Co. v. United States, 204 U. S. 364; S 27:367; L 51:523; Monongahela Bridge v. United States, 216 U. S. 177; S 30: 356; L 54:435; Hannibal Bridge Co. v. United States, 221 U. S. 194; S 31:603; L 55:699.

[29]Post Office cases cited above.

[30]Interior Department, Public Lands: see McDaid v. Oklahoma, 150 U. S. 209; S 14:59; L 37:1055; Orchard v. Alexander, 157 U. S. 372; S 15:635; L 39:737; Plested v. Abbey, 228 U. S. 42; S 33:503; L 57:724.

Interior Department, Patent Office: see United States v. Duell, 172 U. S. 576; S 19:286; L 43:559.

[31]See cases cited above. See, also, United States v. Birdsall, 233 U. S. 223; S 34:512; L 58:930: (Executive power and duty, under Act of Congress, of making recommendations to a Court, as to sentence); Truskett v. Closser, 236 U. S. 223; S 35:385; L 59:549: (Executive Rules governing State Probate Courts in Indian matters).

[32]§§ 746-752.

of broad and general terms in Legislation, leaving precise definition to the Judicial Branch.[33]

§ 311. Judicial Power in the Legislative Branch.

In so far as is necessary to the exercise of its primary functions, the Legislative Branch is vested with power of Judicial character.[34]

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[33]As, in a street betterments Act, the term "adjacent" (land),—including land not necessarily contiguous. Columbia Heights Co. v. Rudolph, 217 U. S. 547; S 30: 581; L 54: 877. In such case, a broad field of legislation is, in effect, left to the Courts, under the form of power or definition of "adjacent".

So, of the qualification; "except in cases of emergency". Baltimore & O. R. R. v. Interstate Com. Comm., 221 U. S. 612; S 31: 621; L 55: 878.

[34]Tameling v. United States Freehold Co., 93 U. S. 644; L 23: 998; In re Chapman, 166 U. S. 661; S 17: 677; L 41: 1154; (questioning Runkle v. United States, 122 U. S. 543; S 7: 1141; L 30: 1167). See Interstate Comm. Com. v. Delaware, L. & W. R. R., 220 U. S. 235; S 31: 392; L 55: 448; Ross v. Stewart, 227 U. S. 531; S 33: 345, L 57: 626. See, also, generally, Taxation and Eminent Domain and cases there cited.

So, of questions of law arising in determination of qualification and of membership, for and in either House.

As to Contempt, see Anderson v. Dunn, 6 Wh. 204; L 5: 242; Kilbourn v. Thompson, 103 U. S. 168; L 26: 377.

CHAPTER LIV.

Political Law.

§ 312. The General Principle.

Entirely distinct from the question of vesting in the Executive Branch, of power essentially Judicial, is the question of existence and of definition and delimitation of the field of Political law, as not Judicial in character, but generically within Executive competency.

The Federal law, in this matter, tacitly adopts the principles of the Common Law.[1]

§ 313. Illustration.

Fields within which questions of law are Political law, and, as such, are within the Exclusive competency of the Executive Branch, are as follows:—

Recognition of a Foreign governmental establishment,[2] or of a newly established nation.[3]

Determination of Foreign public character of an armed foreign vessel, in one of our ports.[4]

Determination of the question of Sovereignty of a certain Foreign Power over an island in the open Ocean.[5]

Determination of a question of existence of a state of Belligerency in a Foreign country.[6]

Determination of Diplomatic status of persons presenting themselves here as representatives of Foreign nations.[7]

Determination of the scope of Treaty power of particular officials of a Foreign nation.[8]

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[1]See §§ 507, 508.

[2]Underhill v. Hernandez, 168 U. S. 250; S 18: 83; L 42: 456.

[3]Rose v. Himely, 4 Cr. 241; L 2: 608; Gelston v. Hoyt, 3 Wh. 246; L 4: 381; Kennett v. Chambers, 14 How. 38; L 14: 316.

[4]Schooner Exchange v. M'Faddon, 7 Cr. 116; L 3: 287.

[5]Williams v. Suffolk Ins. Co., 13 Pet. 415; L 10: 226.

[6]United States v. Palmer, 3 Wh. 610; L 4: 471; The Divina Pastoria, 4 Wh. 52; L 4: 512.

[7]In re Baiz, 135 U. S. 403; S 10: 854; L 34: 222; Iasigi v. Van de Carr, 166 U. S. 391; S 17: 595; L 41: 1045.

[8]Doe v. Braden, 16 How. 635; L 14: 1090.

Determination of questions of condition precedent of operation of a Treaty.[9]

Determination of a question of existence of Federal Sovereignty—de jure or de facto—over an area lately of a Foreign nation.[10]

Determination of the date of accomplishment of Conquest by the United States of Foreign area.[11]

Determination of certain classes of questions of Interpretation of a Treaty, in respect of boundary-lines.[12]

Determination of mode of perfecting obscure or imperfect private rights, protected in general terms by a Treaty.[13]

Determination of a question of regularity as between rival State governmental establishments.[14]

Determination of the question of occasion for calling the State militia into service.[15]

Determination of the question whether, in case of Insurrection, the Federal Military authority has, at a given date, become established, within a certain Insurrectionary intra-State[16] area.

Determination of questions arising in carrying out of a Reconstruction Act.[17]

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[9]Bong v. Campbell Art Co., 214 U. S. 236; S 29:628; L 53:979 (Reciprocity Copyright Treaty).

[10]Jones v. United States, 137 U. S. 202; S 11:80; L 34:691; Pearcy v. Stranahan, 205 U. S. 257; S 27:545; L 51:793.

[11]United States v. Pico, 23 How. 321; L 16:464; United States v. Yorba, 1 Wall. 412; L 17:635; Hornsby v. United States, 10 Wall. 224; L 19:900; More v. Steinbach, 127 U. S. 70; S 8:1067; L 32:51.

[12]Foster v. Neilson, 2 Pet. 253; L 7:415; Garcia v. Lee, 12 Pet. 511; L 9:1176.

[13]Landes v. Brant, 10 How. 348; L 13:449; Doe v. Braden, cited above; United States v. Yorba, cited above; Ainsa v. United States, 161 U. S. 208; S 16:544; L 40:673; United States v. Sandoval, 231 U. S. 28; S 34:1; L 58:107.

[14]Luther v. Borden, 7 How. 1; L 12:581.

[15]Martin v. Mott, 12 Wh. 19; L 6:537.

[16]Keely v. Sanders, 99 U. S. 441, 446; L 25:327.

[17]Georgia v. Stanton, 6 Wall. 50; L 18:721; White v. Hart, 13 Wall. 646; L 20:685.

See also, Republican Form of Government, (§ 153).

CHAPTER LV.

TREATY AS LAW OF THE LAND.[1]

§ 314. The General Principle.

1. Under the principles of the general Law of Nations, a Treaty does not take immediate and direct operation upon persons and things, but (in respect of persons and things) is binding only upon the contracting Sovereigns—simply imposing upon them respectively a duty of putting the Treaty into operation upon persons and things, by law enacted to that end.[2]

2. This doctrine of the general Law of Nations prevailed in the United States prior to the Constitution.[3]

3. The Constitutional text cited, annulled, for the Federal realm, (intra-State and extra-State) the doctrine, above stated, of the general Law of Nations, and operates, proprio vigore, to give to a Treaty immediate and direct operation upon persons and things, without requirement of Congressional legislation supplementary to the Treaty.[4]

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[1]Const., Art. VI:—

> * * * This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.
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[2]Ware v. Hylton, 3 Dal. 199, 244 et seq.; L 1:568.

[3]Ware v. Hylton, cited above: in a suit subsequent to the taking effect of the Constitution, a pre-Constitution Treaty held not operative, in absence of supplementary Congressional legislation, upon land title as of a period prior to the Constitution.

[4]Fairfax's Devisee v. Hunter's Lessee, 7 Cr. 603; L 3:453; Harden v. Fisher, 1 Wh. 300; L 4:96; Martin v. Humter's Lessee, 1 Wh. 304; L 4:97; Chirac v. Chirac, 2 Wh. 259; L 4:234; Craig v. Bradford, 3 Wh. 594; L 4:467; Foster v. Neilson, 2 Pet. 253, 314; L 7:415; Delassus v. United States, 9 Pet. 117; L 9:71; Strother v. Lucas, 12 Pet. 410; L 9:1137; Lattimer v. Poteet, 14 Pet. 4; L 10:328; United States v. 43 Gals. of Whiskey, 93 U. S. 188; L 23:846; Head Money Cases, 112 U. S. 580, 598; S 5:247; L 28:798; In re Cooper, 143 U. S. 472, 502; S 12:453; L 36:232; Maiorano v. Baltimore & O. R. R., 213 U. S. 268; S 29:424; L 53:792; see also Orr v. Hodgson, 4 Wh. 453; L 4:613; Hughes v. Edwards, 9 Wh. 489; L 6:142; Carneal v. Banks, 10 Wh. 181; L 6:297.

As Law of the Land it operates proprio vigore (a) to nullify, pro tanto, existing State or Federal law inconsistent with it, and correspondingly (b) to incapacitate the States severally, in futuro, for legislation.[5]

4. The word "made", in the clause, "and all treaties made", of the text cited, meant "heretofore made": i. e., made prior to the taking effect of the Constitution.[6]

§ 315. Power of Direct Action upon Private Property Rights.

It is competent to deal by Treaty directly with the field of private title.[7]

§ 316. The Question of Retroactive Operation, as of the Date of Initial Signing.

Where, by law of either of the contracting parties, an initial signing of a Treaty requires ratification by a separate officiel, (as in the case of the United States, by the Senate), the Treaty is, by the general Law of Nations, presumptively operative as between the contracting parties, as political societies, retroactively, as of the date of signing.

Upon private interests, however, it operates presumptively only as of and from the date of ratification.[8]

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[5]Geofroy v. Riggs, 133 U. S. 262; S 10:295; L 33:642; Maiorano v. Baltimore & O. R. R., 213 U. S. 268; S 29:424; L 53:792.

[6]Ware v. Hylton, cited above (at p. 277); Chirac v. Chirac, cited above; Shanks v. Dupont, 3 Pet. 242; L 7:666; Hauenstein v. Lynham, 100 U. S. 483, 488; L 25:628.

[7]Thus, by the Treaty of Peace of 1783, with Great Britain, inhabitants of the States were permitted to elect between British and American citizenship; and one who elected the former, and made change of domicil accordingly, (and thereby became to us an alien), became thereby subject to State law—where such State law existed—of incapacitation of aliens in respect of holding title to land. United States v. Repentigny, 5 Wall. 211; L 18:211 (pertinent, since the Constitution, inasmuch as the Constitution made no diminution of pre-existing Federal Treaty power. (Case cited below).

So, where land is held, in a given State, by aliens, upon title defeasible by the State, on office found, by reason of the alienage, it is competent to the United States, by Treaty, to make the title absolute. Fairfax's Devisee v. Hunter's Lessee, 7 Cr. 603; L 3:453: dealing with a post-Constitution Treaty (of 1794).

[8]Haver v. Yaker, 9 Wall. 32; L 19:571; (a Treaty capacitating citizens of the Foreign country in question to take land by descent, within any State of the Union, held not to operate retroactively to defeat title which had, between the signing and the ratification of

§ 317. Power of Conveyance of Property of the United States, by Treaty.

The questions that arise in respect of power of binding the United States by Treaty to payment of money, do not arise in respect of power to convey, by Treaty, property belonging to the United States as public land.[9]

§ 318. Scope of Potential Action upon Aliens.

Within broad limits, it is competent under the Treaty power, to deal personally with aliens, (citizens or subjects of the other contracting Power), here actually or prospectively present.[10]

§ 319. Scope of the Treaty Power in Respect of Citizens of the United States.

The scope of Federal Treaty power in respect of citizens of the United States (whether citizens of particular States or not), comprises power of extradition.[11]

The power may be assumed to involve, as an incident, Congressional power of domestic dealing with citizens of the United States, as far as is necessary or convenient for effectuating Treaty stipulations.[12]

§ 320. Treaty as Organic Law.

In so far as Treaty provisions are in the nature of executed, as distinguished from executory, contract (as, in the case of a Boundary Treaty or of a Treaty of Cession of Ter-

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the Treaty, vested in a widow, by reason of incapacity by State law of the heirs, as aliens.

[9]E. g., land owned by the United States may be conveyed by Indian Treaty, either to the Tribe in question (Jones v. Meehan, 175 U. S. 1; S 20:1; L 44:49; United States v. Conway, 175 U. S. 60; S 20:13; L 44:72); or to individual members of the Tribe, in severalty (Francis v. Francis, 203 U. S. 233; S 27:129; L 51:165).

[10]E. g., to provide for the delivering of a deserter (from the army or navy of such power) when found within a State; (Tucker v. Alexandroff, 183 U. S. 424; S 22:195; L 46:264); or for exclusive custody by a foreign consul of a merchant seaman either (a) for sending him with his ship or (b) for return to his own country, for trial. Dallemagne v. Moisan, 197 U. S. 169; S 25:422; L 49:709.

[11]Johnson v. Browne, 205 U. S. 309; S 27:539; L 51:816.

[12]As, penalizing action by such citizens, hostile in character to, or inconsistent with, effective operations of a Treaty. Baldwin v. Franks, 120 U. S. 678, 693; S 7:656; L 30:766: "The United States are bound" et seq.

ritory by or to the United States) they are not subject to revocation, and they run with the land.[13]

They are, thereby, Federal Organic law.[14]

§ 321. The Question of Power of Alteration, by Treaty, of Federal Organic Law, Proper.

To an extent not as yet authoritatively defined with much particularity, the Federal Treaty power is a power of material alteration, in favor of the United States, of the division line specifically fixed by the Constitution between Federal and State authority, in, and in respect of, State area proper. For example, a Treaty may effectually provide for an extension, beyond the scope specifically fixed by the Constitution, of Federal intra-State Judicial jurisdiction.[15]

§ 322. Indian Treaties.

What has been said above applies (in extra-State and in intra-State area) to Treaty with Indian Tribes, as it does to Foreign Treaty.[16]

§ 323. Judicial Aspect of the Treaty Power:—in Ascertainment of Boundaries.

It is competent to the Treaty-making power to ascertain, as against all persons concerned, boundaries, even when the boundary-line in question is a boundary-line of a State. This power extends to periods preceding the date of the Treaty; and the Treaty ascertainment operates directly upon private title.[17]

§ 324. The Aspect of Mere Law, Repealable as Such.

In so far as a Treaty is of executory nature, it is, in the contemplation of Federal law, on a footing no higher than

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[13]United States v. Repentigny, 5 Wall. 211; L 18:627.

[14]"Organic": see Uses of Terms, at the beginning of the treatise.

[15]As, by Congressional establishment of Courts of Treaty Claims. Comegys v. Vasse, 1 Pet. 193; L 7:108; Burgess v. Gray, 16 How. 48; L 14:839; Williams v. Heard, 140 U. S. 529; S 11:885; L 35:550.

See also § 323.

[16]United States v. 43 Gallons of Whiskey, 93 U. S. 188; L 23:846.

[17]Lattimer v. Poteet, 14 Pet 4; L 10:328; (a case of Federal-Indian Treaty, fixing, in 1798, a line between an Indian nation and a State, as of the period 1783, as against private titles made at the earlier date under State grant).

that of an Act of Congress, and is thereby capable of annulment, in futuro, by Congress.[18]

That is to say, the Treaty-making authority is, in respect of this class of Treaty provision, not vested with power to bind the Legislative Branch; and it therefore stands, in this field of Treaty, on a Legislative plane.

§ 325. The Question of Power of Binding the United States to the Payment of Money.

The question has long been in controversy, whether the Treaty-making power dominates, or is dominated by, powers specifically vested by the Constitution in Congress in respect of money appropriations.

The Treaty-making officiel repeatedly has assumed, in the making of a Treaty, the former view; while the latter view has been asserted, in terms, by the House of Representatives.

§ 326. Power of Creation of a Trust, Binding upon the United States.

It is competent to the Treaty-making power to impose a trust upon the United States, at least in respect of land or of property acquired by the United States by a Treaty.[19]

§ 327. Ascertainment of the Date of Taking Effect of a Treaty:—Interpretation of Treaties.

It is, of course, competent, in general, to the Treaty-making authority, in making a Treaty, to fix the date of its taking effect. Where such date is not specifically fixed, but is ascertainable only by interpretation of the Treaty transaction as a whole, the question of such date is inherently of Judicial character; and power of determination of it may be (and under actual Federal Procedure law, is) vested in the Judicial Branch.[20]

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[18]Chinese Exclusion Case, 130 U. S. 581; S 9:623; L 32:1068; Whitney v. Robertson, 124 U. S. 190; S 8:456; L 31:386; Head Money Cases, 112 U. S. 580, 597 et seq.; S 5:247; L 28:798.

[19]Thus, the Treaty by which the Louisiana Purchase was acquired, imposed upon the United States various trusts, one of which was that of raising the area ultimately to Statehood. Oklahoma v. Atchison, T., & S. F. Ry., 220 U. S. 277, 282 S 31:434; L 55:465.

[20]United States v. American Sugar Co., 202 U. S. 563; S 26:717; L 50:1149; Franklin Sugar Co. v. United States, 202 U. S. 580; S 26:720; L 50:1153.

CHAPTER LVI.

Due Process of Law in Legislative Procedure, as Procedure.[1]

§ 328. Prefatory:—Scope of the Chapter.

1. In the present Chapter, the term "Legislative" will be used in the broad sense of law-making power, in whatever officiel, Federal or State, vested.[2]

2. By the expression "Due Process of Law", in the title of the Chapter, we mean: not details of Legislative Procedure, but fundamental and generic delimitation of law-making power, as such, in the Federal, and in the State, sphere, alike.

§ 329. Definiteness of Expression.

Legislative language must be reasonably clear and definite.[3] This principle has no application where terms, in themselves vague, are used in a technical sense, or are plainly adoptive of established propositions;[4] or in respect of forms of expression sanctioned by the Common Law, leaving a certain degree of judgment or discretion in certain fields to the Judicial Branch,[5] or to the Executive Branch.[6]

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[1]As to differentiation of Due Process, as between (a) Legislative and (b) Judicial, Procedure, see § 425.

As to Due Process of Law in Judicial Procedure, see §§ 558 et seq.

[2]As to particulars of such broad sense, see Uses of Terms.

[3]Cotting v. Kansas City Stock Yards, 183 U. S. 79; S 22:30; L 46:92; (penalty increasing with second offense, but no description of "offense").

International Harvester Co. v. Kentucky, 234 U. S. 216; S 34:947; L 58:1284; Collins v. Kentucky, 234 U. S. 634; S 34:924; L 58:1510; American Machine Co. v. Kentucky, 236 U. S. 660; S 35:456; L 59:773; severally holding "real value" too vague.

On the contrary, a hotel night-watchman Act held not too vague by not specifying in what manner guests were to be notified of fire. Miller v. Strahl, 239 U. S. 426; S 36:147; L 60:364.

[4]E. g., adoptive of the general conceptions, principles, and definitions of the Common Law of Restraint of Trade. Waters-Pierce Oil Co. v. Texas (No. 1) 212 U. S. 86; S 29:220; L 53:417 (State penalization of acts which "tend" or are "reasonably calculated to" unduly restrain trade, not void as too vague). So, of corresponding language of the Sherman Act.

[5]Cases cited above. [6]§ 309.

§ 330. Notice, and Opportunity to be Heard.

The Federal Organic requirement of notice and opportunity to be heard, is not, in general, operative upon a primary Legislative body (Congress; a State Legislature; or a Legislature of a self-governing Federal State),[7] or upon a minor board of Legislative character, where the number of persons affected is so great as practically to insure notice to all.[8]

In general, however, it is operative upon minor Legislative bodies or officials,—such bodies or officials being, pro tanto, of quasi-Judicial character.[9]

§ 331. Impartiality, in Delegated Legislative Power.

Power of Legislative character cannot be delegated to persons directly interested in the subject-matter.[10]

§ 332. Misuse of Terms.

It is hardly necessary to observe that a Legislative body cannot change the nature of things by giving a mis-definition to words of definite meaning.[11]

§ 333. Retroactive Power, Purely as Such:—Curative Legislation.[12]

Legislative power, purely as such,[13] is not limited to the future, but may deal with the past. Thus, past conviction

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[7]As, in the matter of legislative Divorce. Maynard v. Hill, 125 U. S. 190; S 8:723; L 31:654.

[8]Bi-Metallic Co. v. Colorado, 239 U. S. 441; S 36:141; L 60:372.

[9]§§ 566, 567.

[10]Thus, establishment of building-lines cannot be delegated to part of the abuttors. Eubank v. Richmond, 226 U. S. 137; S 33:76; L 57:156.

The principle is held not to apply to a statutory provision for the fixing, from time to time, by posted notice, of the particular hours of labor permitted under a Labor Act; with delegation to a public law-officer, of approval of the mere form of the notice. Riley v. Massachusetts, 232 U. S. 671; S 34:469; L 58:788.

[11]As, by declaring a certain wharf to be a nuisance, (Yates v. Milwaukee, 10 Wall. 497; L 19:984) or by defining as "peddlers" a class of persons who are not peddlers. Crenshaw v. Arkansas, 227 U. S. 389; S 33:294; L 57:565; Rogers v. Arkansas, 227 U. S. 401; S 33:298; L 57:569.

[12]See also § 335.

[13]I. e., apart from such specific Constitutional provisions as the Impairment Clause and the Ex Post Facto provisions.

of crime may be made a present and a future disqualification from certain forms of occupation.[14]

The principle is of most frequent application in Curative legislation. Illustration may be presented as follows:—

(1) Absence of Judicial jurisdiction may be made good, ab initio, to an extent consistent with fundamental conceptions of justice.

Thus, if a Probate Court of a certain State, issues to an executor there qualified, an order of sale of land of the decedent, in another State, without authority in any form from the latter State, it is (subject to general qualifications mentioned in the text) competent to the Legislature of the latter State to validate, retroactively, a sale made under the terms of the order,[15]—that Legislature having been competent originally to adopt, in futuro, such action of the authorities of the former State.[16]

When Congress, in admitting a Territory as a State, had failed to provide for cases pending at the time, in the Supreme Court, upon Appeal or Error from or to Courts of the Territory, the defect was retroactively curable by Congress.[17]

(2) Mere irregularities in Tax Procedure may, in general, be cured retroactively.[18]

A fortiori, retroactive Curative legislation is permissible when the failure to collect a tax is due to misfeasance or non-feasance of taxable persons in question.[19]

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[14]Hawker v. New York, 170 U. S. 189; S 18: 573; L 42: 1002; (statutory disqualification, for the practice of medicine, of persons convicted of crime prior to the statute).

[15]Wilkinson v. Leland, 2 Pet. 627; L 7: 542; Leland v. Wilkinson, 10 Pet. 294; L 9: 430.

[16]Manley v. Park, 187 U. S. 547; S 23: 208; L 47: 296.

[17]Freeborn v. Smith, 2 Wall. 160; L 17: 922.

[18]Stanley v. Supervisors of Albany, 121 U. S. 535; S 7: 1234; L 30: 1000; Williams v. Supervisors of Albany, 122 U. S. 154; S 7: 1244; L 30: 1088; Spencer v. Merchant, 125 U. S. 345; S 8: 921; L 31: 763; Weyerhaueser v. Minnesota, 176 U. S. 550; S 20: 485; L 44: 583; Lombard v. West Chicago, 181 U. S. 33; S 21: 507; L 45: 731; Gallup v. Schmidt, 183 U. S. 300; S 22: 162; L 46: 207; Florida Central etc. R. R. v. Reynolds, 183 U. S. 471; S 22: 176; L 46: 283.

[19]Citizens' Bank v. Kentucky, 217 U. S. 443; S 30: 532; L 54: 832; Kentucky Union Co. v. Kentucky, 219 U. S. 140; S 31: 171; L 55: 137. Thus, a State statute may retroactively charge interest upon overdue taxes from the date of delinquency (League v. Texas, 184

(3) Imperfect Executive action may be validated,[20] and, within limits, Executive action wholly destitute of authority may be validated.[21]

§ 334. Recognition of Honorary Claims.

It not infrequently occurs that value (as, in services, or in materials) is rendered to a political society, of higher or of lower plane, within the proper scope of activity of such society, without true public authorization, or true public action, but with color thereof. In such case, it is consistent with Due Process, and with rights of all persons concerned, that the colorable public action or authorization be converted, by retroactive Curative action, into actual public action or authority, ab initio.[22]

U. S. 156; S 22:475; L 46:478); or may, in the case of wild lands, provide forfeiture (unless payment made) for default in payment of back taxes. Case last cited.

[20]Watson v. Mercer, 8 Pet. 88; L 8:876; retroactive validation, by a State Legislature, of defective certificates of acknowledgment (of deeds) not setting forth all the required particulars.

[21]Tiaco v. Forbes, 228 U. S. 549; S 33:585; L 57:960: (validation by the Legislature of a Federal Foreign Possession, of an Executive order—invalid when issued—of deportation of an alien).

[22]Emerson's heirs v. Hall, 13 Pet. 409; L 10:223; retroactive Congressional Bounty legislation, for seizure, by Federal officers, and for procuring condemnation to the United States; (recital, in the Act, of "an omission in" the law of the period of the seizure). See the Opinion, pp. 411 et seq.

Milnor v. Metz, 16 Pet. 221; L 10:943; retroactive validation, by Congress, of invalid employment of a person in a minor official position.

Quincy v. Cooke, 107 U. S. 549; S 2:614; L 27:549; Gross v. United States Mortg. Co., 108 U. S. 477; S 2:940; L 27:795; Comanche County v. Lewis, 133 U. S. 198; S 10:286; L 33:604; Harper County v. Rose, 140 U. S. 71; S 11:710; L 35:344; (State legislative validation of invalid but meritorious municipal bonds).

Utter v. Franklin, 172 U. S. 416; S 19:183; L 43:498 (Congressional like validation of invalid, but meritorious, Territorial bonds).

Price v. Forrest, 173 U. S. 410; S 19:434; L 43:749; (Congressional retroactive adoption and validation, as against the United States, of an advance made, in the interest of the United States by a Federal disbursing officer, from his own funds, in the course of his duties, but without actual authority of law).

Guthrie Bank v. Guthrie, 173 U. S. 528; S 19:513; L 43:796; (a provisional municipal government, existing in Territory of the United States, without authority of law, but supported by general consent, in the absence of provision for de jure government, held

Within the conception and principle now immediately in question, is the situation of action taken in good faith by private persons in reliance upon Legislative action regular in form, but invalid. Such action may be recognized as a ground of pecuniary public indemnity to them.[23]

§ 335. Retroactive Waiver of Public Policy.

Since discretionary particulars of Public Policy are, in general, established in the interest of the public, and not of particular private persons, such features existing, as of one period, may be retroactively waived by the public, by subsequent legislation, even as against private interests concerned. That is to say,—just as private individuals are at all times subject to a change in futuro, in Public Policy,[24] so they are subject to like change as of the past; or, in other words, one has no vested right in existing Public Policy merely as such.

Thus, contracts void, or voidable, when made, merely by reason of conflict with Public Policy, may be retroactively validated.[25]

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capable of recognition, to the extent of power of the Territorial government, subsequently to authorize payment by a corresponding de jure local government, subsequently established, of meritorious claims for money supplied to, and used by, such informal government, to the permanent benefit of the community in question; and in character within the proper scope of power of such de jure government).

[23]United States v. Realty Co., 163 U. S. 427; S 16:1120; L 41:215.

[24]See Public Policy.

[25]Gross v. United States Mortg. Co., 108 U. S. 477; S 2:940; L 27:798 (State validation of mortgages made to foreign corporations). So, in effect, West Side Belt R. R. v. Pittsburgh Construction Co., 219 U. S. 92; S 31:196; L 55:107.

Webb v. Den, 17 How. 576; L 15:35; McFaddin v. Evans-Snider-Buel Co., 185 U. S. 505; S 22:758; L 46:1012: statutes curative of absence of registration of deeds or the like.

CHAPTER LVII.

Ex Post Facto Laws:—Attainder:—Cruel and Unusual Punishments, Etc.

§ 336. Ex Post Facto Laws.[1]

Like other technical Common Law terms, the term "ex post facto law" is employed, in the Constitution, in the technical Common Law sense.[2]

Where, by existing law, a conviction of a lower offence, is, in legal effect, an acquittal of a higher offence, also alleged, an acquittal so effected cannot be nullified by Legislative change of the Procedure in question.[3]

Solitary confinement preceding execution cannot, after a crime is committed, be added to the death penalty.[4]

The definition of ex post facto law does not extend to mere enlargement of rules of evidence, of general character;[5] to provision for Appeal or Error, upon questions of law, by the Government;[6] to extension of the period between judgment, and execution of death-penalty;[7] to substitution of electrocution for hanging;[8] or to change of venue.[9]

§ 337. Bills of Attainder.

In this field, also, the Constitution employs terms in the technical Common Law sense.[10]

The term "bills of attainder" includes what were specifi-

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[1]Const., Art. I, § 9 (operative upon Congress): * * * No bill of attainder or ex post facto law shall be passed * * *.

Const., Art. I, § 10 (operative upon States):—No State shall * * * pass any bill of attainder, ex post facto law. * * *

[2]Cases cited below.

[3]Kring v. Missouri, 107 U. S. 221; S 2:443; L 27:506.

[4]Medley, Pet'r, 134 U. S. 160; S 10:384; L 33:835.

[5]Thompson v. Missouri, 171 U. S. 380; S 18:922; L 43:204.

[6]Mallett v. North Carolina, 181 U. S. 589; S 21:730; L 45:1015.

[7]Rooney v. North Dakota, 196 U. S. 319; S 25:264; L 49:494.

[8]Malloy v. South Carolina, 237 U. S. 180; S 35; 507; L 59:905.

[9]Gut v. State, 9 Wall. 35; L 19:573.

[10]For the texts, see above.

cally known at the Common Law as "bills of pains and penalties".[11]

The Constitutional text extends to deprivation of Civil Rights.[12]

§ 338. Cruel and Unusual Punishments:—Excessive Fines.[13]

1. THE CONSTITUTIONAL TEXT.—While the Eighth Amendment (cited above) is limited to Federal action, it is perhaps possible that the policy expressed in it is to be considered as read into the Due Process text of the Fourteenth Amendment.[14]

2. CRUEL AND UNUSUAL PUNISHMENTS.—The scope and effect of the Constitutional text has been considered in a case turning upon like text in the so-called Philippine Bill of Rights.[15]

3. EXCESSIVE FINES.—Mere magnitude in amount does not bring a fine within the Constitutional text: the matter of amount is relative.[16]

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[11]Cummings v. Missouri, 4 Wall. 277; L 18:356; Ex parte Garland, 4 Wall. 333; L 18:366; Pierce v. Carskadon, 16 Wall. 234; L 21:276.

[12]Cases cited.

[13]Eighth Amendment (addressed to Federal action):— * * * nor excessive fines imposed, nor cruel and unusual punishment be inflicted.

[14]See the course of reasoning in McDonald v. Massachusetts, 180 U. S. 311; S 21:389; L 45:542. (State Habitual Criminal Act).

[15]Weems v. United States, 217 U. S. 349; S 30:544; L 54:793; a certain length, and certain particulars, of imprisonment, held "cruel and unusual" within the "Philippine Bill of Rights."

[16]Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86; S 29:220; L 53:417: penalties of $5,000 a day, amounting to $1,600,000, held not invalid by force of the Constitutional text.

CHAPTER LVIII.

The De Facto Principle.

§ 339. The Principle, Generally.

The De Facto principle of the Common Law and of the Law of Nations, falls within the Federal Adoption[1] of those bodies of law respectively.[2]

§ 340. A Specialization.

There has arisen, in this country, in the field now in question, a specialization based upon the conditions of frontier life. A conspicuous feature of the political and of the legal history of Federal area and of States made therefrom, has been: a spontaneous formation, within one or another part of such area, of a systematic Customary Code, not authorized or sanctioned by law, but having complete recognition, observance, and enforcement in such community. Rights

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[1] §§ 509; 551.

[2] United States v. Rice, 4 Wh. 246; L 4:562; Underhill v. Hernandez, 168 U. S. 250; S 18:83; L 42:456: recognition of authority of a Foreign de facto government.

Pearcy v. Stranahan, 205 U. S. 257; S 27:545; L 51:793. In 1906 the question whether the Sovereignty de jure of the Isle of Pines was, by the terms of the establishment of the Republic of Cuba, in Cuba or in the United States, was an open one; but the Republic of Cuba was in actual possession, without actual challenge by the United States. In this situation, and without regard to the de jure Sovereignty, the Isle of Pines was foreign country, within the meaning of the then existing tariff legislation of the United States.

County of Ralls v. Douglass, 105 U. S. 728; L 26:957: (de facto State County Judge, in Civil matters).

In re Manning, 139 U. S. 504; S 11:624; L 34:264: (de facto State Judge in Criminal case).

Ex parte Ward, 173 U. S. 452; S 19:459; L 43:765: (de facto Federal Judge, in Criminal case).

Waite v. Santa Cruz, 184 U. S. 302; S 22:327; L 46:552 (de facto municipal officer to authenticate bonds).

Tulare District v. Shepard, 185 U. S. 1; S 22:531; L 46:773: (de facto municipal corporation).

Phillips v. Payne, 92 U. S. 130, 133; L 23:649 (recognizing, as possible, mere de facto Sovereignty of Virginia over a portion—retroceded, in terms, to Virginia—of the original District of Columbia,—

established and recognized by such law may be capable of recognition, as if they had arisen by law proper.[3]

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the Constitutionality of the Act of retrocession being challenged by a tax payer).

Corbett v. Nutt, 10 Wall. 464; L 19:976 (colorable Judicial appointment as trustee under a will).

As to absence of de facto Sovereignty in the Confederate States of America, see § 159.

[3]Sparrow v. Strong, 3 Wall. 97; L 18:49; a case of Federal Judicial recognition (in respect of Jurisdictional Amount) of value, in a Territory, of a mining claim, not of regular legal standing. The Court, after mentioning the establishment, in 1861, of Nevada, as a Territory, with the usual Territorial powers, say (p. 100):—

> "Independently of this, however, a special kind of law—a sort of common law of the miners—the offspring of a nation's irresistible march—lawless in some senses, yet clothed with dignity by a conception of the immense social results mingled with the fortunes of these bold investigators—had sprung up on our Pacific Coast, and presented, in the value of a 'Mining Right' a novel and peculiar question of jurisdiction for this court."

See the historical note, case cited, at p. 100.

CHAPTER LIX.

INTERPRETATION.

§ 341. General View.

Interpretation of Written Law, Organic or non-Organic, is publicly visible mainly in the Judicial field. Interpretation, however, is constantly being carried on by the Legislative and the Executive Branches, in fields of action not within the Judicial power. Thus, the Treasury Department is constantly engaged in passing, with finality, upon the proper interpretation of Appropriation Bills; while the Legislative Branch is often required to pass, with finality, upon interpretation of the Constitution (as in the matter of title of a Senator or a Representative to a seat).

Since there can be only one true meaning of a Written text, the matter of Interpretation is matter of Substantive law.

§ 342. Federal Adoption of Common Law Conceptions, Principles, and Conventions.

In the field of Interpretation, the Federal law adopts the Common Law conceptions, principles, and conventions, with such specialization as Federal conditions require. We have occasion, therefore, only to consider certain leading and typical Federal specializations.

§ 343. Presumption of Constitutionality.[1]

The Common Law presumption rite acta takes on, in the Federal law, the form (among other forms) of a presumption that Legislative text (Federal or State) of a plane below that of Federal Organic law is consistent with that Organic law; or—in briefer terms—of a presumption of Federal constitutionality.

Since there can be no such thing as a presumption of law, but a presumption is, by its nature, necessarily a presumption of fact, this presumption of constitutionality is, in substance, a presumption of fact, namely: a presumption

[1]In the present section, the term "constitutionality" is used in its broad sense, namely, the sense of consistency with Organic law as a whole, Written and Unwritten.

(in respect of such text, not wholly explicit) of intent on the part of a law-making body in question of action only within the powers of such body:—a presumption applied by contraction or expansion, as the case may be, of the letter of the text.[2]

§ 344. Severability, Based upon the Presumption of Constitutionality.

Where the proposition of severability is, as matter of general principle, a doubtful one, and severability is essential to constitutionality of a part, the presumption of constitutionality may be invoked, in support of severability as an essential of constitutionality.[3]

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[2]In re Chapman, 166 U. S. 661; S 17:677; L 41:1154. An Act of Congress in terms penalized refusal to testify before "any committee of either House of Congress" in answer to any question pertinent to the matter of inquiry in consideration before the committee. The word "any" was held to intend only matters within the jurisdiction of one or of the other House, and properly under consideration by a Committee.

The Abby Dodge, 223 U. S. 166; S 32:310; L 56:390. (An Act of Congress in its letter dealing with intra-State as well as extra-State ocean area, and viewed (p. 175) as unconstitutional, if including the intra-State area, contrued, in support of constitutionality, as exclusive of that area).

So, United States v. Coombs, 12 Pet. 72; L 9:1004; Grenada County Supervisors v. Brogden, 112 U. S. 261; S 5:125; L 28:704; Japanese Immigrant Case, 189 U. S. 86; S 23:611; L 47:721; St. Louis Southw. Ry. v. Arkansas, 235 U. S. 350; S 35:99; L 59: 265; United States v. Jin Fuey Moy, 241 U. S. 394; S 36:658; L 60: 1061.

Typical examples of failure of the presumption of constitutionality are: United States v. Reese, 92 U. S. 214; L 23:563; Trade-Mark Cases, 100 U. S. 82; L 25: 550; United States v. Harris, 106 U. S. 629; S 1: 601; L 27: 290; Baldwin v. Franks, 120 U. S. 678; S 7: 656; L 30:766; James v. Bowman, 190 U. S. 127; S 23:678; L 47:979; Illinois Centr. R. R. v. McKendree, 203 U. S. 514; S 27: 153; L 51:298; Employers' Liability Cases, 207 U. S. 463; S 28:141; L. 52:297.

[3]Illustrative cases are: Presser v. Illinois, 116 U. S. 252; S 6:580; L 29:615; Clayton v. Utah Territory, 132 U. S. 632; S 10:190; L 33:455; Berea College v. Kentucky, 211 U. S. 45; S 29:33; L 53: 81; Willcox v. Consolidated Gas Co., 212 U. S. 19; S 29:192; L 53: 382; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159; S 29:270; L 53:453; El Paso etc. Ry. v. Gutierrez, 215 U. S. 87; S 30:21; L 54:

106; Southern Pac. Co. v. Portland, 227 U. S. 559; Brazee v. Michigan, 241 U. S. 340; S 36:561; L 60:1034.

For typical instances of non-separability, see Santa Clara County v. Southern Pac. R. R., 118 U. S. 394; S 6:1132; L 30:118; California v. Central Pac. R. R., 127 U. S. 1; S 8:1073; L 32:150; Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601; S 15:912; L 39:1108; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; S 22:431; L 46:679; Employers' Liability Cases, 207 U. S. 463; S 28:141; L 52:297; Muskrat v. United States, 219 U. S. 346; S 31:250; L 55:246; Oklahoma v. Wells, Fargo & Co., 223 U. S. 298; S 32:218; L 56:445; Butts v. Merchants' etc. Transp'n Co., 230 U. S. 126; S 33:964; L 57:1422.

CHAPTER LX.

The Doctrine of Parens Patriae.

§ 345. The Matter Generally.

The Federal law adopts and applies, generally, the Common Law doctrine of Parens Patriae.

Within a general Federal sphere of action, the United States is Parens Patriae.[1]

Within its delegated field of action, a self-governing Federal State is Parens Patriae.[2]

Within a sphere of State action, a State is Parens Patriae; as, in respect of protection of free-swimming fish, in the sea, but within the limits of the State;[3] of custody of property of a person presumptively deceased;[4] and for status as plaintiff, in a suit concerning interests of general character, as, water-supply; minerals; pollution of waters, and the like.[5]

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[1]Mormon Church v. United States, 136 U. S. 1; S 10:792; L 34:478; 140 U. S. 665; S 11:884; L 35:592; 150 U. S. 145; S 14:44; L 37:1033.

[2]New York Foundling Hospital v. Gatti, 203 U. S. 429; S 27:53; L 51:254.

[3]Manchester v. Massachusetts, 139 U. S. 240; S 11:559; L 35:159; Lawton v. Steele, 152 U. S. 133; S 14:499; L 38:385.

[4]Provident Inst'n for Savings v. Malone, 221 U. S. 660; S 31:661; L 55:899.

[5]Coosaw Mining Co. v. South Carolina, 144 U. S. 550; S 12:689; L 36:537; Missouri v. Illinois & Chicago Dist., 180 U. S. 208; S 21:331; L 45:497; and 200 U. S. 496; S 26:268; L 50:572; Kansas v. Colorado, 206 U. S. 46 (see p. 117, ad fin.); S 27:655; L 51:956; Georgia v. Tennessee Copper Co., 206 U. S. 230; S 27:618; L 51:1038; Hudson Water Co. v. McCarter, 209 U. S. 349; S 28:529; L 52:828.

For instances of absence of such status, see Louisiana v. Texas, 176 U. S. 1; S 20:251; L 44:347; Oklahoma v. Atchison, T. & S. F. Ry., 220 U. S. 277; S 31:431; L 55:436.

CHAPTER LXI.

Domestic Public Boundary Lines.

§ 346. Such Law as Federal Law.

The law of domestic public boundary-lines, (except within a State), is, of necessity, Federal law, even as between two States.[1]

§ 347. Federal Adoption, for This Field, of the Principles of the General Law of Nations.

For the purpose of the matter now in question, the Federal law tacitly adopts the pertinent general principles of the Law of Nations as Federally understood. Illustration of application of those principles is presented in succeeding sections.

§ 348. Littoral Ocean Waters.

Two adjoining land areas, bordering upon the Ocean, ordinarily and presumptively extend, respectively, to the so-called three-mile limit. Their common boundary line is therefore projected upon the Ocean to the three-mile limit.[2]

§ 349. Channel:—Rule of the Thalweg.

Where two areas meet in a navigable water area, with a channel (as, a river or an arm of the sea) and the boundary-line is in terms fixed only by such body of water, the rule of the Thalweg is applied:[3] the main channel being dominative, where there are more channels than one.[4]

§ 350. Shifting of the Channel.

Development, by natural causes, of a new and practically more important channel, does not carry the boundary-line

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[1]For illustration, see cases cited below.

[2]Hamburg-American S. S. Co. v. Grube, 196 U. S. 407; S 25:352; L 49:529.

[3]Jones v. Soulard, 24 How. 41; L 16:604; Iowa v. Illinois, 147 U. S. 1; S 13:239; L 37:55; and 202 U. S. 59; S 26:571; L 50:934; Louisiana v. Mississippi, 202 U. S. 1; S 26:408; L 50:913; Moore v. McGuire, 205 U. S. 214; S 27:483; L 51:776; United States v. Chandler-Dunbar Co., 209 U. S. 447; S 28:579; L 52:881.

[4]Cases above cited.

to such later channel, but it remains in the original channel;[5] nor does even the gradual closing up, by natural causes, of the original channel shift the boundary-line, but it remains where it was.[6]

§ 351. Accretion:—Avulsion.

Accretion (by gradual changes) carries with it a change of the boundary-line;[7] while avulsion (sudden and violent change) has not such operation, but leaves the boundary-line where it was.[8]

It is immaterial, to these intents, whether the shifting arises from natural causes,[9] or from lawfully established, and lawfully conducted, public works.[10]

§ 352. Adverse Occupation:—Presumption.

Operation of presumptions in this field is illustrated in the case of long-continued acquiescence of the States (and of border-owners) in respect of a State line.[11]

Such occupation may operate to alter the de jure line, in some degree.[12]

§ 353. Islands.

The principles above stated involve the corollary that an island remains within a given area, or shifts to another

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[5]Washington v. Oregon, 211 U. S. 127; S 29:47; L 53:118, and 214 U. S. 205; S 29:631; L 53:969.

[6]Indiana v. Kentucky, 136 U. S. 479; S 10:1051; L 34:329.

[7]St. Louis v. Rutz, 138 U. S. 226; S 11:357; L 34:941; Jefferis v. East Omaha Co., 134 U. S. 178; S 10:518; L 33:872; Missouri v. Nebraska, 196 U. S. 23; S 25:155; L 49:372; Moore v. McGuire, 205 U. S. 214; S 27:483; L 51:776; Missouri v. Kansas, 213 U. S. 78; S 29:417; L 53:706.

[8]Nebraska v. Iowa, 143 U. S. 359; S 12:396; L 36:186; Missouri v. Kansas, cited above.

[9]As in the various cases cited above.

[10]As, a jetty, built by the United States. Washington v. Oregon, 211 U. S. 127; S 29:47; L 53:118; 214 U. S. 205; S 29:631; L 53:969.

[11]Alabama v. Georgia, 23 How. 505; L 16:556; Indiana v. Kentucky, 136 U. S. 479; S 10:1051; L 34:329; Moore v. McGuire, 205 U. S. 214, 220; S 27:483; L 51:776; Maryland v. West Virginia, 217 U. S. 1; S 30:268; L 54:643; 217 U. S. 577; S 30:630; L 54:888; 225 U. S. 1; S 32:672; L 56:955.

[12]Cases cited.

area, according as change in the water area proceeds by and from accretion, or by and from avulsion.[13]

§ 354. Boundaries of Federal Judicial Districts.

What has been said in respect of State boundaries is applicable, mutatis mutandis, to the boundaries of Federal Judicial Districts as fixed by State lines.[14]

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[13]Missouri v. Kansas, 213 U. S. 78; S 29:417; L 53:706; Wedding v. Meyler, 192 U. S. 573; S 24:322; L 48:570.

[14]Devoe Mfg. Co., Pet'r, 108 U. S. 401; S 2:894; L 27:764.

PART II.

PRINCIPLES PRIMARILY OF PRIVATE CONCERN.

CHAPTER LXII.

TAXATION.

§ 355. Scope of the Chapter.

It is proposed in the present Chapter to deal with such general features of the Federal law of Taxation as are peculiar to Taxation, Federal or State. Features not peculiar to that field are considered at other points, under more general heads.[1]

§ 356. Federal Adoption, in General, of Common Law Conceptions and Principles.

Subject to specific Tax texts, and to general texts,[2] of the Constitution, and to other Federal Organic law,[3] the Federal law adopts the Common law conceptions, principles, and practice of and in the field of Taxation.[4]

Thus, taxation is, by definition, limited to objects fairly capable of being viewed as of public interest.[5]

§ 357. Taxation in Federal Area.

Pursuant to the absence, in general, of specific textual dealing, by the Constitution, with particulars of the Federal Sovereignty in and in respect of Federal area, the Constitution does not deal specifically with Taxation in such area, but leaves that matter to be dealt with by general principles.[6]

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[1]As, (a) under the various heads (Book III) definitory of areal scope of power of a State or a Federal State, and (b) under the various Due Process heads (Book V).

For such matters, see Index, under Taxation, and under particular heads.

[2]As, the Equal Protection texts of the Fifth and the Fourteenth Amendments.

[3]As, that of Federal Immunity from State Taxation, q. v. (§§125-134).

[4]See later sections of this chapter.

[5]Loan Ass'n v. Topeka, 20 Wall. 655, 659 et seq.; L 22:455 (as matter of Due Process of Law, under the Fourteenth Amendment, State taxation not permissible in aid of a private manufacturing enterprise). See citation of the case, § 452.

[6]Gibbons v. District of Columbia, 116 U. S. 404; S 6:427; L 29:680; Bauman v. Ross, 167 U. S. 548; S 17:966; L 42:270; Parsons

§ 358. Technical Terms of the Constitutional Texts.

Pursuant to a general principle, technical Common Law Tax terms are employed in the Constitution in their technical Common Law sense.[7]

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v. District of Columbia, 170 U. S. 45; S 18:521; L 42:943; Wight v. Davidson, 181 U. S. 371; S 21:616; L 45:900; Columbia Heights Co. v. Rudolph, 217 U. S. 547; S 30:581; L 54:877; Briscoe v. District of Columbia, 221 U. S. 547; S 31:671; L 55:848.

[7] Tax.—Royall v. Virginia, 116 U. S. 572; S 6:510; L 29:735: (license fee as tax, upon the facts). Hodge v. Muscatine County, 196 U. S. 276; S 25:237; L 49:477: (distinction between tax proper, and Penalty).

Excise.—Pacific Ins. Co. v. Soule, 7 Wall. 433; L 19:95; Turpin v. Burgess, 117 U. S. 504; S 6:835; L 29:988; Patton v. Brady, 184 U. S. 608; S 22:493; L 46:713; Snyder v. Bettman, 190 U. S. 249; S 23:803; L 47:1035; Thomas v. United States, 192 U. S. 363; S 24:305; L 48:481; United States v. Whitridge, 231 U. S. 144; S 34:24; L 58:159. See also cases cited in the next succeeding section, under "Direct Tax."

Tonnage Tax.—Steamship Co. v. Portwardens, 6 Wall. 31; S 24:305; L 48:481; State Tonnage Tax Cases, 12 Wall. 204; L 20:370; Peete v. Morgan, 19 Wall. 581; L 22:201; Cannon v. New Orleans, 20 Wall. 577; L 22:417; Inman S. S. Co. v. Tinker, 94 U. S. 238; L 24:118.

Mere taxation of vessels by value, is not "tonnage" tax, even where tonnage is treated as an element or test of value. Transportation Co. v. Wheeling, 99 U. S. 273; L 25:412.

Export.—A stamp tax upon an outgoing bill of lading (Almy v. California, 24 How. 169; L 16:644; Fairbank v. United States, 181 U. S. 283; S 21:648; L 45:862), or upon a charter-party (United States v. Hvoslef, 237 U. S. 1; S 35:459; L 59:813) or upon a marine policy (Thames & Mersey Ins. Co. v. United States, 237 U. S. 19; S 35:496; L 59:821) is an "export" tax.

Manufacture, with a view to exportation, is not "export". Cornell v. Coyne, 192 U. S. 418; S 24:383; L 48:504.

For exceptional use of the term in a certain Act of Congress, see United States v. Chavez, 228 U. S. 525; S 33:595; L 57:950.

Import.—Woodruff v. Parham, 8 Wall. 123; L 19:382; Brown v. Maryland, 12 Wh. 419; L 6:678; (the latter case holding that a State statute undertaking to require a license fee as a pre-requisite to sale of imported merchandize, is, in effect, a tax on the imported goods, and so within the Constitutional prohibition upon State imposts or duties on imports).

See Swan v. Finch Co. v. United States, 190 U. S. 143; S 23:702; L 47:984 (decayed cargo, destroyed, under health regulations, and never actually landed, not "imports", within the meaning of a certain Tariff Act).

Inspection Laws.—People v. Compagnie Gen. Transatlantique, 107

§ 359. **Certain Terms Not Strictly Technical:—"Direct Taxes":—"Uniform".**

1. "DIRECT TAXES".—The term "direct taxes", intends (apart from Capitation taxes) taxes upon land (in the Common Law sense of that term),[8] and income from land.[9]

The latter aspect of the Constitutional text has, however, been annulled.[10]

Such Direct Tax limitation (as now qualified by the Sixteenth Amendment) seems, therefore, now to be limited to land, in view of the recognized breadth of Federal Tax power, in other fields.[11]

In the case of a direct tax other than a capitation tax, Congress, having allotted as among the States, by population, the total amount proposed to be raised, may provide for direct Federal assessment of it, within the States, severally, upon the specific properties subject to the tax,[12] either (a) upon a uniform Federal system, or (b) by adoption of the respective State systems.[13]

2. "Uniform".[14]

The term "uniform", in the text cited, is, for the purposes now in question, an equivalent of the term "equal" (as the latter term is used in the Equal Protection clause of the Fourteenth Amendment and is present, in legal effect,[15] in the Due Process clause of the Fifth Amendment); and simply embodies and assumes, as against Congressional tax

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U. S. 59; S 2:87; L 27:383 (holding that Const., Art. I, § 10, cl. 2, relates only to property, and not to persons).

[8]Pacific Ins. Co. v. Soule, 7 Wall. 433; L 19:95; Springer v. United States, 102 U. S. 586; L 26:253; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; S 15:673; L 39:759; and 158 U. S. 601; S 15:912; L 39:1108.

[9]Pollock v. Farmers' Loan & Trust Co., cited above.

[10]Sixteenth Amendment:—

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the States, and without regard to any census or enumeration.

[11]See cases cited in the following sections.

[12]Springer v. United States, 102 U. S. 586; L 26:253.

[13]Case cited.

[14]Art. I, § 8:—

> * * * but all duties, imposts, and excises shall be uniform throughout the United States;

[15]§ 427.

action, the Common Law conception and definition of Equality before the law,—the Common Law conception and definition as thus Federally adopted, embracing a wide scope of departure from absolute equality or uniformity, and intending simply absence of arbitrary and unreasonable preference or discrimination.[16]

§ 360. "Taxes, Duties, Imposts and Excises".

It follows from what has been said that the Congressional power of laying "taxes, duties, imposts and excises" is of broad and sweeping scope, outside of land, as such.[17]

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[16]Pacific Ins. Co. v. Soule, 7 Wall. 433; L 19:95 (the gross amount of outstanding insurance of an insurance corporation, as basis of an excise tax).

Scholey v. Rew, 23 Wall. 331; L 23:99.

Railroad v. Collector, 100 U. S. 595; L 25:647; Flint v. Stone Tracy Co., 220 U. S. 107; S 31:342; L 55:389: (net income of corporations, as basis of an excise tax).

Gibbons v. District of Columbia, 116 U. S. 404; S 6:427; L 29:680.

Nicol v. Ames, 173 U. S. 509; S 19:522; L 43:786; Treat v. White, 181 U. S. 264; S 21:611; L 45:853 (sales as basis of stamp-excise tax).

Knowlton v. Moore, 178 U. S. 41; S 20:747; L 44:969; Brushaber v. Union Pac. R. R., 240 U. S. 1; S 36:236; L 60:493; Stanton v. Baltic Min'g Co., 240 U. S. 103; S 36:278; L 60:546: (grading of potential tax-payers, by a Federal income-tax Act, and with varying exemptions).

Patton v. Brady, 184 U. S. 608; S 22:493; L 46:713 (manufactured, or unmanufactured, tobacco).

Spreckels Sugar Ref'g Co. v. McClain, 192 U. S. 397; S 24:376; L 48:496; (gross receipts above a certain amount).

McCray v. United States, 195 U. S. 27; S 24:769; L 49:78.

Billings v. United States, 232 U. S. 261; S 34:421; L 58:596; (differentiation for excise taxation between vessels used as merchant vessels and vessels used as pleasure yachts).

Anderson v. Forty-Two Broadway Co., 239 U. S. 69; S 36:17; L 60:152 (corporation, of small capital stock, but large bond issues, representing assets, taxable by Congress on the larger aspect).

[17]Hylton v. United States, 3 Dal. 171; L 1:556; License Tax Cases, 5 Wall. 462; L 18:497; Scholey v. Rew, 23 Wall. 331; L 23:99; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; S 15:673; L 39:759; Nicol v. Ames, 173 U. S. 509; S 19:522; L 43:786; Knowlton v. Moore, 178 U. S. 41; S 20:747; L 44:969; Patton v. Brady, 184 U. S. 608; S 22:493; L 46:713; Thomas v. United States, 192 U. S. 363; S 24:305; L 48:481; Spreckles Sugar Ref. Co. v. McClain, 192 U. S. 397; S 24:376; L 48:496; Flint v. Stone Tracy

§ 361. Tax, Such in Form, Only.

It was a common governmental practice, at the Common Law, to lay certain pecuniary charges, not for the purpose of revenue, but by way of incident to some governmental function other than that of Taxation. In a loose sense of the term, such charges were, at the Common Law, and are in the Federal Law, called taxes. They are, however, not taxes proper.

Within this class is the Federal Head Money "tax," loosely so-called, imposed upon, or in respect of, alien immigrants as an incident of regulation of immigration.[18]

The Federal "tax", so-called (of eight per centum per annum) upon the bank-note circulation of State banks, is in form a Revenue measure; but, in substance, and practically, it is an Inhibition of State bank-notes; and is effectual, as such, under the Congressional potential Exclusiveness in the matter of money.[19]

So, the Federal suprastate oleomargarine tax, in so far as its primary design and its operation are prohibition or regulation of sales, is not tax proper, but is simply an exercise of the Congressional suprastate Commerce power.[20]

Within the class of taxes, such in form, but not in substance, are, further, various familiar forms of charge for use of public property.[21]

Co., 220 U. S. 107; S 31:342; L 55:389; Billings v. United States, 232 U. S. 231; S 34:421; L 58:596; Stratton's Independence v. Howbert, 231 U. S. 399; S 34:136; L 58:285.

[18]Head Money Cases, 112 U. S. 580, 595; S 5:247; L 28:798.

[19]Veazie Bank v. Fenno, 8 Wall. 533, 549; L 19:482; National Bank v. United States, 101 U. S. 1; L 25:979; Head Money Cases, cited above; Twin City Bank v. Nebeker, 167 U. S. 196; S 17:766; L 42:134.

[20]McCray v. United States, 195 U. S. 27; S 24:769; L 49:78.

[21]Where a municipal corporation of a State has, under State law, power to lease portions, not actually used for travel, of public streets, a moderate imposition per pole, for telegraph poles in a street, is capable of justification as a charge for use of street space, and of differentiation thereby from Taxation. St. Louis v. Western Un. Tel. Co., 148 U. S. 92; S 13:485; L 37:380; 149 U. S. 465; S 13:990; L 37:810; 166 U. S. 388; S 17:608; L 41:1044; Western Un. Tel. Co. v. Richmond, 224 U. S. 160; S 32:449; L 56:710.

So, where a wharf is owned by a State or by one of its municipal corporations, a charge upon vessels for use of the wharf is not within the Tonnage prohibition of the Constitution, merely by the grading of

§ 362. Taxation a Legislative Function.

1. GENERALLY.—Taxation, with its Incidents, is a Legislative function.[22]

2. DELEGATION OF LEGISLATIVE POWER.—In this field, as in other fields, in general, the general principles, elsewhere stated, of power of delegation of Legislative power, as, to municipal corporations, or to officials, are operative.[23]

There is, however, this distinction between primary, and delegated, Legislative action: that the broad presumption of sound discretion, attaching to such primary action, does not attach (or attaches with far less weight) to action of minor officials acting under delegated power; but action of such officials is quasi-Judicial in character.[24]

§ 363. The Question of Requirement of Notice and Opportunity to be Heard.

The Federal Constitutional requirements of notice and opportunity to be heard, are, in the field of Taxation, not operative (a) upon a primary Legislative body, or (b) upon a subordinate body of Legislative character, where the

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the charge by tonnage. Packet Co. v. Keokuk, 95 U. S. 80; L 24: 377; Packet Co. v. St. Louis, 100 U. S. 423; L 25:688; Vicksburg v. Tobin, 100 U. S. 430; Packet Co. v. Catlettsburg, 105 U. S. 559; L 26:1169; Transportation Co. v. Parkersburg, 107 U. S. 691; S 2: 732; L 27:584; provided, of course, that there is no discrimination against suprastate Commerce. Guy v. Baltimore, 100 U. S. 434; L 25:743.

[22]Heine v. Levee Comm'rs, 19 Wall. 655; L 22:223; Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453; S 26:660; L 50:1102; Chicago, B. & Q. Ry. v. Babcock, 204 U. S. 585; S 27:326; L 51: 636.

By way of illustration of Legislative character in Taxation, we may refer to the absence (at least under existing Congressional legislation) of power in a Federal Court of Equity, in passing adversely upon a State Railroad Commission's rates, to substitute new rates. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; S 14:1047; L 38:1014.

[23]Cases, generally, cited in this Chapter.

[24]Western Un. Tel. Co. v. Gottlieb, 190 U. S. 412, 426; S 23:730; L 47:1116; Chicago, B. & Q. Ry. v. Babcock, 204 U. S. 585, cited above; Londoner v. Denver, 210 U. S. 373, 380; S 28:708; L 52: 1103; Embree v. Kansas City Road Dist., 240 U. S. 242, 247; S 36: 317; L 60:624.

See the succeeding section.

number of persons affected is so large as to afford a presumption of notice to all.[25]

In other situations they are operative upon such subordinate bodies.[26]

§ 364. Methods and Processes of Assessment and Collection:—Quasi-Judicial Aspect in Assessment.

1. Methods and Processes.—The methods of assessment are, in general, matter of Legislative competency. Thus, in the case of "special" Taxation, either apart from, or as an incident of Eminent Domain, assessment, not by the size or by the value of parcels, but by the front foot, is, in and of itself, within the Legislative discretion.[27]

Taxation may be at the source, in the hands of trustees, creditors, or custodians. Thus, shares or bonds of a corporation may be taxed in the hands of the corporation,[28] and the corporation may be subjected to payment, and given a lien upon the shares or bonds, for re-imbursement, or a right of personal action against the owner.[29]

So, of a Head Money "tax," assessed upon a shipping corporation,[30] and of a franchise tax laid upon the actual user (although not the owner) of the franchise.[31]

So, bank deposits may be taxed in the hands of the bank.[32]

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[25] § 330. [26] §§ 566, 567.

[27] Parsons v. District of Columbia, 170 U. S. 45; S 18: 521; L 42: 943; French v. Barber Asphalt Co., 181 U. S. 324; S 21: 625; L 45: 879; Tonawanda v. Lyon, 181 U. S. 389; S 21: 609; L 45: 908; Webster v. Fargo, 181 U. S. 394; S 21: 623; L 45: 912; Hibben v. Smith, 191 U. S. 310; S 24: 88; L 48: 195.

[28] National Bank v. Commonwealth, 9 Wall. 353; L 19: 701; United States v. Railroad, 17 Wall. 322; L 21: 597; Tappan v. Merchants' Bank, 19 Wall. 490; L 22: 189; Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232; S 10: 533; L 33: 892; Jennings v. Coal Ridge Coal Co., 147 U. S. 147; S 13: 282; L 37: 116; Aberdeen Bank v. Chehalis County, 166 U. S. 440; S 17: 629; L 41: 1069; Corry v. Baltimore, 196 U. S. 466; S 25: 297; L 49: 556.

[29] Cases last cited.

[30] Head Money Cases, 112 U. S. 580; S 5: 247; L 28: 798.

[31] Illinois Centr. R. R. v. Kentucky, 218 U. S. 551; S 31: 95; L 54: 1147.

[32] Clement Bank v. Vermont, 231 U. S. 120; S 34: 31; L 58: 147. It is, of course, to be understood that we are here speaking only of such shares or bonds as are, under general principles (of situs and the

Upon failure of a tax-return, required by law, persons taxable may be doomed.[33]

A tax sale, with record of a tax-deed, may be made presumptively valid; and a special limitation of the time for challenge of the tax title may be provided.[34]

Tax assessment upon land, and procedure of enforcement, may be made procedure in rem; and owners of land may be made bound to take notice of tax proceedings fairly capable of ascertainment by them,[35] and of extrinsic facts material to taxation, and naturally within the knowledge (or power of knowledge) of the person in question.[36]

Process of distraint may be provided.[37]

A tax list may be made prima facie evidence of valid assessment.[38]

Granted jurisdiction of a person or thing, for taxation, there may be valid enforcement of a tax assessed, without regard to its validity under particular circumstances in question, provided there be afforded a remedy by suit to recover back the tax amount paid.[39]

Safe-deposit corporations may be required by law to hold a box sealed for a reasonable period after the lessee's death, for inspection by a public officer jointly with private persons interested, with a view to the question of succession-tax.[40]

Mortgaged land may be taxed for its full value, without

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like) taxable by the taxing authority in question. See Situs for Taxation.

[33]Glidden v. Harrington, 189 U. S. 255; S 23:574; L 47:798.

[34]Saranac Land Co. v. New York, 177 U. S. 318; S 20:642; L 44:786 (the legislation in question dealing with wild lands).

[35]Ontario Land Co. v. Yordy, 212 U. S. 152; S 29:278; L 53:449; Ontario Land Co. v. Wilfong, 223 U. S. 543; S 32:328; L 56:544.

[36]As, in respect of future or present use of a building by a lessee. Hodge v. Muscatine County, 196 U. S. 276; S 25:237; L 49:477.

[37]Springer v. United States, 102 U. S. 586; L 26:253.

[38]Singer Sew. Mach. Co. v. Benedict, 229 U. S. 481; S 33:942; L 57:1288.

[39]Atchison, T. & S. F. Ry. v. O'Connor, 223 U. S. 280; S 32:216; L 56:436; Singer Sew. Mach. Co. v. Benedict, 229 U. S. 481; S 33:942; L 57:1288.

[40]National Safe Dep. Co. v. Illinois, 232 U. S. 58; S 34:209; L 58:504.

deduction from the owner's personal estate of the amount of the mortgage debt.[41]

A marked illustration of Legislative power and potential exclusiveness, in this general field, is presented in the assessability of the cost of grading, paving, and curbing of a street, upon the right-of-way bed of an adjoining railroad, not proximately benefited.[42]

A State tax may be laid upon goods in a United States bonded warehouse, although enforcement is, under the general principles of Federal Immunity from State action, under suspension.[43]

Taxation may be of a certain interest in a property res.[44]

2. Quasi-Judicial Aspect.—A certain degree of quasi-Judicial aspect, in the field now in question, is presented in the requirement (within certain limits) of notice and opportunity to be heard;[45] in requirement (by the Congressional Judiciary legislation) of resort to State Appellate or Revisory Executive authority as a condition of Federal Judicial relief;[46] and in the quasi-judgment character (as against collateral challenge) of an order of a Board of Equalization of the usual State type.[47]

§ 365. Situs for Taxation.

For purposes of taxation of chattels (corporeal and incorporeal) as among States and Federal States, the Federal law adopts the conceptions and principles of the Law of Nations and of the Common Law, in respect of situs of such chattels.[48]

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[41]Paddell v. New York City, 211 U. S. 446; S 29:139; L 53:275.

[42]Louisville & Nashv. R. R. v. Barber Asphalt Co., 197 U. S. 430; S 25:466; L 49:819.

[43]Carstairs v. Cochran, 193 U. S. 10; S 24:318; L 48:596. See under Federal Immunity from State Action (§§ 125-134).

[44]Thus, the Federal statutory procedure by Collector's sale, as against a delinquent distiller, sells only the latter's interest in a property res in question. Mansfield v. Excelsior Co., 135 U. S. 326; S 10:825; L 34:162.

[45]§§ 566, 567. [46]§ 796, ¶ 1.

[47]Western Un. Tel. Co. v. Gottlieb, 190 U. S. 412; S 23:730; L 47:1116.

[48]§§ 246-252; 253-264; 291, 292.

So, of general Federal Taxation, as between the United States and a Foreign country.[49]

§ 366. Succession Taxes.

It may be proper to refer to certain decisions upon the comparatively recent head of succession tax.[50]

§ 367. Extension of the Common Law:—Incidents of Taxation.

The principles of Extension of Common Law principles,[51] are operative in this, as in other fields, generally. Thus, although a tax is not, at the Common Law, a lien upon property taxed,[52] it is competent to Legislative authority, (and is consistent with Due Process) to make Extension of the Common Law, and to make a tax a lien upon real or upon personal property.[53]

We may, in this connection, refer to the feature of Legislative power (Federal or State), consistently with Federal Organic law, to attach to tax legislation reasonable Incidents.[54]

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[49]United States v. Bennett, 232 U. S. 299; S 34:433; L 58:612: (Congress may tax a vessel owned by a citizen of the United States although it may be exclusively kept and used in a Foreign country).

[50]Where, by local law, a wife's share in "community" property, passes, upon and by her decease, to the husband, the husband's succession in title is State-taxable. (Moffitt v. Kelly, 218 U. S. 400; S 31:79; L 54:1086). So, of succession of a remainderman under a trust deed, under which the grantor is a life tenant (Keeney v. New York, U. S. 525; S 32:105; L 56:299); or of taking by devise or legacy, (Cahen v. Brewster, 203 U. S. 543; S 27:174; L 51:310); or by execution, by will, of a testamentary power, (Orr v. Gilman, 183 U. S. 278; S 22:213; L 46:196); whether such power was itself created after, or before, the tax legislation in question. Cahen v. Brewster, cited above; Chanler v. Kelsey, 205 U. S. 466; S 27: 550; L 51:882.

Bullen v. Wisconsin, 240 U. S. 625; S 36:473; L 60:830 (valid State succession tax upon property passing, upon the donor's death, under a trust deed revocable by him during his life).

[51]See Extension (§§ 554-557).

[52]Heine v. Levee Comm'rs, 19 Wall. 655; L 22:223.

[53]Seattle v. Kelleher, 195 U. S. 351; S 25:44; L 49:232; Citizens' Bank v. Kentucky, 217 U. S. 443; S 30:532; L 54:832: cases of State legislation, but applicable in principle to Federal legislation, —the principles of Due Process being the same for both. (See Due Process).

[54]Felsenheld v. United States, 186 U. S. 126; S 22:740; L 46: 1085 (power of Congress to restrict stamp-taxed packages to the taxed commodity).

§ 368. **Severability of an Assessment.**

The general principles of severance of a legal from an illegal feature, are—in the view of the Federal law, and in Federal practice—applicable to a tax in part valid, and in part invalid.[55]

§ 369. **Motive.**

In accordance with a general Common Law principle (to the effect that a course of action, in and of itself matter of right is not, in general, invalidated, at law, by the motive of the party acting), an act otherwise lawful is not made unlawful by being done with a view to avoid prospective taxation: as the drawing of two separate checks, aggregating a certain amount, to forestall a stamp-tax, payable upon a single check of that aggregate amount.[56]

In Equity, however, a different view may prevail, in a particular instance, where the person in question seeks affirmative Equitable relief.[57]

§ 370. **The Question of Interest.**

Presumptively, (in the Federal view) a tax assessed draws interest from the time when it is payable.[58]

§ 371. **The Question of Personal Liability.**

Presumptively, a tax upon property creates not merely a public right in rem, but a personal liability of the owner or possessor; and the statutory provision for enforcement is presumptively not exclusive.[59]

§ 372. **Localization of Taxation.—"Special Taxes".**[60]

1. GENERALLY.—It was, of course, the universal practice

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[55]Where an injunction was sought, in the Federal Original Jurisdiction, against a State tax, laid in block upon intra-State and supra-State commerce, and the latter class of commerce was beyond State power, severance was made, and the invalid portion (and that portion only) was enjoined. Ratterman v. Western Un. Tel. Co., 127 U. S. 411; S 8:1127; L 32:229. So, where the partial invalidity is mere matter of amount. Raymond v. Chicago Traction Co., 207 U. S. 20; S 28:7; L 52:78.

[56]United States v. Isham, 17 Wall. 496, 506; L 21:728.

[57]Mitchell v. Commissioners, 91 U. S. 206; L 23:302.

[58]Billings v. United States, 232 U. S. 261; S 34:421; L 58:596.

[59]Rainey v. United States, 232 U. S. 310; S 34:429; L 58:617. This principle is of course, subject to general principles governing power of imposition of personal liability: as to which, see § 227.

[60]In its more general aspects this subject is (a) matter of "uniform" taxation, in respect of Federal taxation and (b) matter of Equal

at the Common law, to tax, in great measure, by localities: as, by cities or parishes; and the Common Law practice has always been represented, in this country, by localization according to counties, cities, or towns, and school, fire, water, and sewage districts, and the like.[61]

Tax areas are not necessarily mutually exclusive, but may overlap each other. Thus, a given parcel of land may lie within and may be taxable in, and as of, a town, a fire district and a school district, whether those areas be co-extensive inter se or not.

2. "Special Taxes".—Localization for Taxation takes the form of what are commonly designated as "special" taxes: that is, taxes laid, for the cost of certain public improvements, upon persons or things deemed to be peculiarly benefited thereby. In such Taxation, there is no departure, in principle, from localization and classification generally; and the same principles apply.[62]

A special tax may be laid after completion of an improvement.[63]

Protection of the Laws, in respect of State taxation. (See those heads). It is, however, treated here, as matter of practical convenience, with proper reference, from the heads referred to, to the present section.

[61]See Soliah v. Neskin, 222 U. S. 522; S 32:103; L 56:294; Houck v. Little River District, 239 U. S. 254, 265; S 36:58; L 60:266; other cases cited below.

[62]Provident Institution v. Jersey City, 113 U. S. 506; S 5:612; L 28:1102; Spencer v. Merchant, 125 U. S. 345; S 8:921; L 31:763; Parsons v. District of Columbia, 170 U. S. 45; S 18:521; L 42:943; Norwood v. Baker, 172 U. S. 269; S 19:187; L 43:443; Lombard v. West Chicago, 181 U. S. 33; S 21:507; L 45:731; French v. Barber Asphalt Co., 181 U. S. 324; S 21:625; L 45:879; Tonawanda v. Lyon, 181 U. S. 389; S 21:609; L 45:908; Detroit v. Parker, 181 U. S. 399; S 21:624; L 45:917; Chadwick v. Kelley, 187 U. S. 540; S 23:175; L 47:293; Seattle v. Kelleher, 195 U. S. 351; S 25:44; L 49:232; Louisville & Nashv. R. R. v. Barber Asphalt Co., 197 U. S. 430; S 25:466; L 49:819; Cleveland, Cinn., etc. Ry. v. Porter, 210 U. S. 177; S 28:647; L 52:1012; Hutchinson v. Valdosta, 227 U. S. 303; S 33:290; L 57:520. For typical instances of unreasonable (and void) establishments of a special tax area, see Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 478; S 36:204; L 60:392; Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55; S 36:254; L 60:526.

[63]Wagner v. Baltimore, 239 U. S. 207; S 36:66; L 60:230.

3. "Special" Taxation as an Incident of Eminent Domain.—When a public improvement in question consists of, or involves, a public taking of property under right of Eminent Domain, and the taxation in question is for reimbursement to the public of an amount paid or to be paid as compensation for the property taken, there is no departure or differentiation in principle from the situation considered in the preceding numbered paragraphs, but the departure or differentiation is merely in form of origin of the public expenditure or liability to be provided for, or to be reimbursed to the public by the "special" taxation in question; and the principles stated in the preceding numbered paragraphs are therefore applicable.[64]

It is immaterial, in such situation, whether or not the "special" class of taxable properties consist wholly or in part (a) of portions not taken, of original estates of which part has been taken, or (b) of estates of which no part has been taken: the only question being one of peculiar benefit to the estates taxed for the cost of the taking.[65]

§ 373. The Question of Potential Amount.

1. While it may be conceivable that, in a particular instance, a tax, Federal or State, might be so great, and so uncalled for, in amount, as to be thereby a departure from Due Process, nevertheless, in the absence of such a theoretical situation, the question of amount is within Legislative discretion, in Federal or in State action.

2. This principle is applicable, like Taxation principles generally, to so-called "special" assessments, whether (a) independent of, or (b) an incident of, a taking under right of Eminent Domain.[66]

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[64]Cases cited below.

[65]Bauman v. Ross, 167 U. S. 548; S 17:966; L 42:270; Wight v. Davidson, 181 U. S. 371; S 21:616; L 45:900; Columbia Heights Co. v. Rudolph, 217 U. S. 547; S 30:581; L 54:877; Briscoe v. District of Columbia, 221 U. S. 547; S 31:679; L 55:848 (cases arising in a Federal area).

To the effect that the owner of land not taken, but potentially assessable for the improvement, is not entitled to notice of the taking, see § 567.

[66]Bauman v. Ross; Wight v. Davidson; Columbia Heights Co. v. Rudolph; Briscoe v. District of Columbia, all cited above: (sustaining, as matter of Due Process, a special assessment of not less than

§ 374. **Potential Repetition of Taxation:—Increase of a Tax.**

1. The laying (and collection) of a tax upon or in respect of a given property res or other subject matter as of a given period, in no sense exhausts the taxing power in respect of such property or other subject matter, as of the period in question; but, as far as principles of Taxation are concerned, it remains subject to repetition of taxation.

Thus, a Federal excise tax having been laid and collected upon or in respect of certain manufactured tobacco, it was competent to Congress immediately thereafter to lay another excise tax upon or in respect of it.[67]

There is, however, in the Federal view, a presumption adverse to intent to such effect, in Tax legislation.[68]

In a particular instance, such double taxation of a particular class of subjects of taxation might, of course, result in violation of Equal Protection of the Laws; but to bring about that result, the two instances of taxation must be upon one and the same subject-matter. Thus, a tax upon property, and a tax upon doing business (with or in respect of such property), do not constitute double taxation, within the principle just stated.[69]

2. What has been said above applies to increase (otherwise lawful) of rate of taxation pending a particular tax period, at least where (in the case of chattels) the property has not changed hands.[70]

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one-half of the cost of a certain Congressional taking of land in a Federal area).

Parsons v. District of Columbia, 170 U. S. 45; S 18:521; L 42:943 (sustaining an assessment, under like conditions, of a certain sum ($1.25) per front foot).

In Norwood v. Baker, 172 U. S. 269; S 19:187; L 43:443, a street was laid out, running wholly through land of a single owner, and the whole value of the strip was assessed upon him, as also the costs of the taking procedure. In respect of the costs, the assessment was held invalid,—since, under the local law, he could have laid out the street himself, at no cost.

[67]Patton v. Brady, 184 U. S. 608; S 22:493; L 46:713.

[68]United States v. Shelley, 229 U. S. 239; S 33:635; L 57:1167.

[69]Ohio Tax Cases, 232 U. S. 576; S 34:372; L 58:737.

[70]Patton v. Brady, cited above.

§ 375. Potential Voluntary and Optional Subjection to Assessment.

It may be provided, in respect of public improvements, of certain classes, that use thereof, by private individuals, may be optional with them; but that, upon availing themselves of the privilege, they shall automatically become subject to a "special" tax incidental to the improvement.[71]

§ 376. Conditions of Taxing Power, as Jurisdictional.

In so far as Jurisdictional conditions, of any character, underlie taxing power, a tax may be challenged collaterally upon the ground of no jurisdiction: as, where power to lay a special assessment was conditioned upon petition (for a public improvement) by a certain class and a certain relative number of property-owners.[72]

The principle is, of course, most frequently invoked and applied where a State or a Federal State undertakes to exercise extra-areal powers.[73]

It is not infrequently invoked in support of a contention that the object for which a tax is laid is (upon Federal Constitutional grounds, or upon other grounds) not within the scope of power of the taxing authority in question.[74]

§ 377. Tax Exemption.

The Federal Constitutional requirements of "uniform" taxation,[75] and Equality in taxation,[76] do not operate to forbid tax Exemptions, Federal or State, based upon reasonable Public Policy.[77]

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[71]Carson v. Brockton Sewerage Comm., 182 U. S. 398; S 21:860; L 45:1151 (a case of a street main sewer, established under State law).

[72]Ogden City v. Armstrong, 168 U. S. 224; S 18:98; L 42:444.

[73]See Situs for Taxation, and cases cited.

[74]Loan Ass'n v. Topeka, 20 Wall. 655; L 22:455; tax cases cited §§ 328-335; 467-484.

[75]§ 359. [76]§§ 497-499.

[77]Ubi supra, and cases there cited.

There appears to be, in the Federal view, a presumption that Legislative tax exemption, expressed in general terms, is not intended to apply to special taxation, (Illinois Centr. R. R. v. Decatur, 147 U. S. 190; S 13:293; L 37:132), taxation of such character being presumptively representative of corresponding increased value of property in question.

§ 378. Failure to Make Return.

Where persons taxable in respect of certain property, are required by law to make return thereof, for taxation, failure to make a return estops such persons from objection to subsequent taxation, and to retroactive provision of tax remedy in respect thereof.[78]

§ 379. Liability to Taxation as Running with the Land.

Where, as of a particular period, land is subject to a certain form or degree of taxation, change of title, pending a period of potential actual taxation, is immaterial, but the purchaser takes subject to such taxation.[79]

§ 380. Presumption of Absence of Intent of Indirect Operation of Tax Legislation.

Congressional Tax Legislation has, presumptively, no intent of indirect operation: as, of forbidding the shifting of the burden.[80]

So, an Act of Congress taxing the occupation of selling alcoholic liquors does not, merely thereby, exempt a person taxed from operation of State law dealing with such occupation.[81]

Such Congressional legislation may, however, without any specific intent thereto, of Congress, have an indirect operation.[82]

§ 381. Estoppel of One Taxed, to Set up Illegality on His Own Part, in Defence against the Tax.

In accordance with a general principle of the law of Estoppel, one who has conducted an activity within a tax-

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[78]Thus, where shares of capital stock of a corporation are required by the State law to be, but are not, returned for taxation, a purchaser takes them subject to an inchoate lien capable of perfection by subsequent assessment under retroactive legislation. Citizens Bank v. Kentucky, 217 U. S. 443; S 30: 532; L 54: 832.

[79]Willoughby v. Chicago, 235 U. S. 45; S 35: 23; L 59: 123.

[80]As, by an express company's requirement that shippers furnish, or pay for, a revenue stamp required of the express company. American Ex. Co. v. Michigan, 177 U. S. 404; S 20: 695; L 44: 823.

[81]McGuire v. Commonwealth, 3 Wall. 387; L 18: 226; License Tax Cases, 5 Wall. 462; L 18: 497; Pervear v. Commonwealth, 5 Wall. 475; L 18: 608.

[82]Wabash R. R. v. Pearce, 192 U. S. 179; S 24: 231; L 48: 397 (indirect or secondary operation of Federal Import tax legislation, in vesting a carrier's lien in a carrier paying the tax at the point of inception of transit by him).

able class of activities, cannot defeat taxation by setting up unlawfulness, on his part, in such action.[83]

§ 382. Determinative Elements of Fact.

In general, any element of fact, which is reasonably germane to the matter of taxation, may be considered, in laying taxes. Thus, character of recent past use of property may be a basis of classification of it, for taxation.[84]

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[83]License Tax Cases, (cited above) at p. 468; Salt Lake City v. Hollister, 118 U. S. 256; S 6:1055; L 30:176.

[84]Billings v. United States, 232 U. S. 261; S 34:421; L 58:596 (recent past use of a vessel as a yacht).

CHAPTER LXIII.

EMINENT DOMAIN: SUBSTANTIVE LAW AND LEGISLATIVE OR EXECUTIVE PROCEDURE.[1]

§ 383. The Common Law Conception.

In the Common Law view, the right of the public to take specific private property for public purposes—with compensation—is matter not of mere Governmental Procedure right, but is primarily matter of public title, with the Public Procedure right a mere incident of the public title. That is to say, one element of definition of private property-title is: dominant title in the public, to certain intents, under the designation of Eminent Domain.[2]

The Common Law requirement of compensation is a mere qualificatory feature of definition of the public title.[3]

§ 384. Federal Organic Texts.

1. ORGANIC TEXT DEALING WITH FEDERAL ACTION.—In respect of Federal action in this field, the Constitution, after providing in general terms (Fifth Amendment) that no person shall "be deprived of * * * property, without due process of law", makes the specific provision that private property shall not "be taken for public use without just compensation".

This latter clause is inserted merely ex industria, and adds nothing in legal effect to the preceding general provision: as appears from the legal operation of a corresponding Due Process clause, in the Fourteenth Amendment, without specific compensation text.[4]

2. FEDERAL ORGANIC TEXT DEALING WITH STATE ACTION. —The Fourteenth Amendment provides that no State shall "deprive any person of * * * property, without due

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[1]As to Judicial Procedure (for compensation, or "damages,") see § 517.

[2]"Domain": the "dominium" (title) of the Roman law.

"Eminent": "eminens" (superior, controlling).

[3]United States v. Jones, 109 U. S. 513, 518; S 3:346; L 27:1015; Traction Co. v. Mining Co., 196 U. S. 239, 252; S 25:251; L 49: 462.

process of law; nor deny to any person * * * the equal protection of the laws".

This provision covers the field of taking by (State) right of Eminent Domain.[5]

§ 385. In General, the Field a Legislative One.

Exercise of the right of Eminent Domain is, in general, (in Federal and in State action) action of Legislative character, and (at the option of the Legislative authority) exclusively of that character,—subject only to such Federal Judicial revisory control (over Federal and over State action) as is required for the enforcement of broad general rights (as that of Due Process, generally; Property, or the like).[6]

§ 386. Potential Delegation of Legislative Power.

1. In Federal Takings.—The Federal Legislative power in the field of Eminent Domain may be delegated, in particular instances, or in particular classes of cases.[7]

2. In State Takings.—A fortiori, (in view of Federal indifference to particulars of State governmental machinery),[8] there may be a corresponding delegation (consistent with Federal law) in the field of State action.[9]

§ 387. Forms of Procedure, Federal or State.

The Federal Organic law prescribes no form of Procedure, Federal or State, in the field in question, but simply requires that there shall be some Procedure within the definition of Due Process of law within the contemplation

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[5] § 425. Cases cited below.

[6] Cases generally, cited in this Chapter.

As to the field of Judicial Procedure incident to Eminent Domain, see §§ 517 ; 722.

[7] Kohl v. United States, 91 U. S. 367; L 23:449; Chappell v. United States, 160 U. S. 499; S 16:397; L 40:510 (cases of Congressional delegation to Federal Executive officials, of power of selecting and taking).

[8] See Republican Form of Government (§ 153).

[9] As in Head v. Amoskeag Mfg. Co., 113 U. S. 9; S 5:441; L 28:889; Clark v. Nash, 198 U. S. 361; S 25:676; L 49:1085; Strickley v. Highland Boy Mining Co., 200 U. S. 527; S 26:301; L 50:581; Hairston v. Danville etc. Ry., 208 U. S. 598; S 28:331; L 52:637; Union Lime Co. v. Chicago & Northw. Ry., 233 U. S. 211; S 34:522; L 58:924.

of the Fifth and the Fourteenth Amendments, respectively.[10]

§ 388. Forms of Property.

1. PROPERTY RES.—From the standpoint of, and for the purposes of Eminent Domain, there is no distinction between different forms or types, as such, of property res, as being, for example, corporeal or incorporeal; natural, or artificial creatures of law, Federal or State; or otherwise differentiated.[11]

2. TITLE:—(a) TAKING OF AN EXISTING TITLE.—What has been said above as to property res is applicable to all forms of existing title to or in a property res. Thus, a taking may be of the whole fee in a particular parcel of land; or of a private easement of way;[12] of the franchise-right of a street-railway, or a gas company, in a public street;[13] of a water company's franchise-rights;[14] or of toll-bridge franchise-rights.[15]

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[10]See Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112; S 17: 56; L 41: 369; Chicago, B. & Q. R. R. v. Chicago, 166 U. S. 226; S 17: 581; L 41: 979; Backus v. Fort Street Union Depot Co., 169 U. S. 557; S 18: 445; L 42: 853.

Due Process involves Equality before the law (Equal Protection of the laws) in both Amendments,—textually in the Fourteenth, and in legal effect (see Equal Protection) in the Fifth Amendment (§§ 426, 427).

[11]West River Bridge v. Dix, 6 How. 507; L 12: 535; (State taking under State Law, of a State toll-bridge franchise); United States v. Gettysburg Elec. Ry., 160 U. S. 668; S 16: 427; L 40: 576; (Federal taking of a State-granted street railway franchise); Long Island Water Co. v. Brooklyn, 166 U. S. 685; S 17: 718; L 41: 1165; (taking, under State law, of a State water-company's franchise and contract right); Offield v. New York, N. H. & H. R. R., 203 U. S. 372; S 27: 72; L 51: 231; (taking, under State law, of a minority of shares of the capital stock of a corporation of the State); Crozier v. Krupp, 224 U. S. 290; S 32: 488; L 56: 771; (Federal taking of a Federally-created Patent right).

United States v. Buffalo-Pitts Co., 234 U. S. 228; S 34: 840; L 58: 1290; (corporeal chattels).

[12]Harris v. Elliott, 10 Pet. 25; L 9: 333; United States v. Welch, 217 U. S. 333; S 30: 527; L 54: 787.

[13]New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; S 6: 252; L 29: 516; United States v. Gettysburg Elec. Ry., cited above.

[14]Long Island Water Co. v. Brooklyn, cited above.

[15]West River Bridge Co. v. Dix, cited above.

3. TITLE:—(b) TITLE NEWLY CREATED BY THE TAKING.—The title acquired by the public, in and by the taking, may be a new title, created by the taking, and not previously existing as a distinct and specific title in any person. Thus, a taking may consist of the creation, in favor of the public, (or of private persons in the public interest), of an easement not previously existing: as, an easement of way, (in the familiar situation of public taking only of an easement in the laying out of a new street); or of flowage.[16]

§ 389. The Question of Private Title.

If, in the course of a taking under Eminent Domain, there arises a question of title in one or in another person, that question is one of Property law, and not of Eminent Domain law; and as a question of Property law it is a question of Judicial, not of Legislative, cognizance.[17]

§ 390. The Question of Value.

The question of value enters into the Legislative and Executive aspects (now under consideration) of Eminent Domain from the standpoint (if from no other) of exercise of sound discretion as to taking particular property. Its primary importance, however, is in the Judicial aspect (that of ascertainment of proper compensation). From either point of view, it is a question of Substantive Law.

Value is determinable by general Common Law principles of that subject.[18]

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[16]Pumpelly v. Green Bay Co., 13 Wall. 166; L 20:557; Chappell v. United States, 160 U. S. 499; S 16:397; L 40:510; United States v. Lynah, 188 U. S. 445; S 23:349; L 47:539.

See Peabody v. United States, 231 U. S. 530, 538; S 34:159; L 58:351; (a question of easement of artillery-practice over a parcel of land).

[17]As to dealing with such a question arising in the course of Judicial Compensation ("damages") ascertainment, see Collateral Issues (§ 575).

If such a question is in litigation in an independent suit, the compensation proceeding might have to await (or to render judgment subject to) such independent suit, according to the Procedure law of a forum (or of forums) in question. See Priority (§§ 621-626).

[18]Boom Co. v. Patterson, 98 U. S. 403; L 25:206; Monongahela Nav. Co. v. United States, 148 U. S. 312; S 13:622; L 37:463; Sharp v. United States, 191 U. S. 341; S 24:114; L 48:211; United States v. Welch, 217 U. S. 333; S 30:527; L 54:787.

In particular, value created by the taking, is not to be considered;[19] and mere inherent collective capacity of a great number of separate estates for a certain form of mere possible public use, is not an element of value of the parcels, severally, in case of a taking for such use.[20]

The value of the property or interest taken may, of course, in a particular instance, be merely nominal, and, in such case, nominal compensation (damages) is sufficient.[21]

§ 391. Unity, or Separateness, in Respect of Different Parcels of Land of One Owner.

The question whether a given parcel of land taken is or is not a part of a larger tract of the same owner, is a question of fact, or of law, or of mixed law and fact.[22]

Upon the question of solidarity, or the reverse, to this intent, of a general property-res, the range of inquiry is a broad one.[23]

This question is intimately related to, (and stands upon much the same footing as), questions of title, and of value; and what has been said in other sections as to those matters would seem to be pertinent to this matter.

§ 392. Informal Taking:—Damage, as Taking.

Taking (of property res, or of property title) is commonly made by formal action. It is, however, sometimes

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[19]Kerr v. South Park Comm'rs, 117 U. S. 379; S 6:801; L 29: 924: (sales anticipatory of increase of value from the taking, not evidence).

[20]McGovern v. New York, 229 U. S. 363; S 33:876; L 57:1228; New York v. Sage, 239 U. S. 57; S 36:25; L 60:143: taking by the City of New York, of a great area, composed of a great number of separate parcels, in the Catskill Mountains, for a dam and reservoir; only original separate values allowed for.

[21]Appleby v. Buffalo, 221 U. S. 524; S 31:699; L 55:838 (bed of a navigable river); Provo Bench Canal Co. v. Tanner, 239 U. S. 323; S 36:101; L 60:307.

[22]Sharp v. United States, 191 U. S. 341; S 24:114; L 48:211 (holding a certain farm, taken, to be distinct from two adjoining farms of the same owner, and not part of a single parcel composed of the three farms).

[23]Including, e. g., the question of a single period, or different periods, of acquisition; single plant, or different plants, of farm buildings; and the like; as in Sharp v. United States, cited above.

made in a more or less informal manner, or by implication.[24]

Mere damage to property, by lawful public action, is not necessarily, in and of itself, an (implied) taking.[25]

This principle has its most familiar application in the doctrine that where property is taken, injury to a distinct piece of property, no part of which has been directly taken, is not a taking of such distinct piece of property.[26]

Where, however, a specific portion (or an easement over a specific portion) of a distinct piece of property is taken, and the taking (or use, thereunder), involves damage to the remainder of such distinct piece, then, and in such case, title in such remainder is viewed as having been taken, to the extent of the damage.[27]

Damage, however, resulting from lawful public action, not in and of itself of Eminent Domain character, may be

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[24]United States v. Russell, 13 Wall. 623; L 20:474; United States v. Great Falls Mfg. Co., 112 U. S. 645; S 5:306; L 28:846; Monongahela Nav. Co. v. United States, 148 U. S. 312; S 13:622; L 37:463; United States v. Lynah, 188 U. S. 445; S 23:349; L 47:539; United States v. Buffalo Pitts Co., 234 U. S. 228; S 34:840; L 58:1290. See also United States v. Grizzard, 219 U. S. 180; S 31:162; L 55:165; Crozier v. Krupp, 224 U. S. 290; S 32:488; L 56:771.

[25]Thus, where the right-of-way easement of a certain railroad corporation, within a city, was subject to the right of the city to lay out a street across the railroad, without compensation to the corporation for laying out as such, the fact that the existence of the new street would, in a particular instance, involve large expense to the railroad corporation for flagmen, or the like, did not constitute a taking of any part of the railroad easement of way (and thereby no compensation was required). Chicago, B. & Q. R. R. v. Chicago, 166 U. S. 226; S 17:581; L 41:979 (a case of a blanket Eminent Domain proceeding involving various estates. The railroad corporation was made a party, with other landowners; so that if the damage was a taking, the proceeding in question included it as a taking).

So, in effect, Hughes v. United States, 230 U. S. 24; S 33:1019; L 57:1374.

[26]Sharp v. United States, 191 U. S. 341; S 24:114; L 48:211. (In Chicago v. Taylor, 125 U. S. 161; S 8:820; L 31:638, the State Constitution in terms provided for compensation for property taken "or damaged").

[27]Thus, where the United States, in the improvement of a river, elected to proceed under its right of Eminent Domain, and permanently flooded a specific portion of a farm, and by so doing cut off the remainder of the farm from access to a highway, the deprivation of such access was held to be a taking, pro tanto, of such remainder of the farm. United States v. Grizzard, cited above.

such, in degree, as to amount in law to a taking by right of Eminent Domain. Thus, when the United States exercises its Commerce power of improvement of a navigable stream, within a State, consequent injury to riparian lands may, on the one hand, be of such moderate degree as to be a mere incident, and thereby damnum absque injuria, or, on the other hand, it may be of such high degree as to constitute a taking, pro tanto, of the general title to, or of a public easement over, a property affected.[28]

There may be an intermediate degree of injury resulting from such lawful action, such as not to amount, in law, to a taking, but to raise (as matter of Interpretation) a presumption of intent, on the part of the public, to waive its strict rights, and to act by way of taking.[29]

In the field now in question, the general principles of Agency are applicable: as, in respect of action of a public official, as being within, or without, the general scope of his agency.[30]

§ 393. Effect upon Neighboring Estates not Taken.

If a specific parcel of land is to be taken, and the proposed use of it requires, for completeness, easements, or other rights (not previously existing) in, over, or in respect of, a neighboring parcel, such easement or other right may be taken, by way of Incident to the taking of the principal parcel. If, however, no such easement or right be taken, the parcel actually taken stands in the same relation to adjoining estates as before the taking: as, for example, in respect of duty not to send noxious fumes upon such other parcels, and in respect of liability in damages for so doing; and the fact that such injuries are a natural incident of the use for which the taking was made is of no pertinency.[31]

The question of what the relation of the two estates was, and the resulting questions of duty and liability in damages, is a matter not (a) of law of Eminent Domain, but

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[28]As in the situation (of flooding of lands) presented in United States v. Lynah, cited above.

[29]See cases cited above.

[30]Hughes v. United States, cited above: (action outside scope of official authority and duty).

[31]Cases cited immediately below.

(b) of local land-title law, and of local law of duty and of tort.[32]

§ 394. The Feature of (by Election) Implied Contract.

As matter of non-Organic Federal law, dealing with Federal takings, an individual whose property has been taken, may waive his right to Eminent Domain procedure, as such, and may (in the Court of Claims) set up an implied contract on the part of the United States to pay him the value of the property taken.[33]

§ 395. Public Waiver of Right, as a Feature of Taking by Eminent Domain.

The public, while having, upon some ground, in a given instance, the right to take, without compensation, may waive its such right, and elect to proceed under its Eminent Domain right alone. In such situation, the principles of Eminent Domain apply.[34]

§ 396. The Question of Assessment for the Amount of Compensation.

The fund required for compensation to a person from whom title to or in property res has been taken, may be provided either by general taxation, or by "special" taxation; or the burden may rest with private persons primar-

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[32]Thus, by the law of Pennsylvania, a street railroad corporation, operating its railroad at a certain point, upon land held by it under Eminent Domain, adjoining, but not within the locus of, a certain city street, was not liable in damages to an abutter on the opposite side of the street, for noise, cinders and the like; Marchant v. Pennsylvania R. R., 153 U. S. 380; S 14:894; L 38:751: (Error to State Court; the question held one of local law); while in the District of Columbia the local law embodied, under circumstances not generically different, duty and liability in damages. Richards v. Washington Terminal Co., 233 U. S. 546; S 34:654; L 58:1088.

In Sharp v. United States, 191 U. S. 341; S 24:114; L 48:211, the evidence offered, of probable artillery-practice use of the land actually taken, was of mere conjectural character. The land was taken for an extension of an already existing Government holding.

[33]United States v. Great Falls Mfg. Co., 112 U. S. 645; S 5:306; L 28:846; United States v. Lynah, 188 U. S. 445; S 23:349; L 47:539.

[34]Monongahela Nav. Co. v. United States, 148 U. S. 312; S 13:622; L 37:463: (a certain Act of Congress held to intend a taking under right of Eminent Domain, and not a destruction, as matter of Federal right, of a dam in a navigable stream).

ily benefited: (as, a railroad corporation, empowered to condemn a right of way). In so far as it is provided for by taxation, general or special, the procedure of raising the fund is matter not of Eminent Domain, but of Taxation; and it is, therefore, considered under that head.[35]

§ 397. Assurance of Compensation.

It is not essential that compensation be contemporaneous with the legal taking. It is sufficient that individuals in question be substantially assured of ultimate payment within a reasonable time. Particulars of such assurance are within the Legislative field, subject only to the qualification that they be reasonable. If they are not reasonable they are inconsistent with Due Process.

It is sufficient if the United States is made responsible;[36] or a State in question;[37] or a municipal corporation of ample available resources;[38] or that upon refusal of a tender, the money be allowed to be deposited in a bank, under the supervision of a Court;[39] or that provision be made for payment into Court, by a railroad corporation, of a sum double the amount of an initial provisional award made by publicly appointed referees, with provision for lapse of the taking, and for liability of the railroad in trespass, in case of failure of ultimate payment.[40]

§ 398. Right of Compensation, as Equal Protection of the Laws.

While the underlying public title, characterized as the right of Eminent Domain, thus underlies (and limits, pro tanto) all private title, it is itself underlain, defined and qualified at the Common Law by a still broader Common

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[35] § 372.

To the effect that the owner of land, not taken, but assessable for the improvement, is not entitled to notice of the taking, see § 567.

[36] Crozier v. Krupp, 224 U. S. 290; S 32:488; L 56:771.

[37] Adirondack Ry. v. New York, 176 U. S. 335; S 20:460; L 44:492.

[38] Sweet v. Rechel, 159 U. S. 380; S 16:43; L 40:188; Williams v. Parker, 188 U. S. 491; S 23:440; L 47:559.

[39] Backus v. Fort Street Union Depot Co., 169 U. S. 557; S 18:445; L 42:853.

[40] Cherokee Nation v. Kansas Ry., 135 U. S. 641; S 10:965; L 34:295.

Law doctrine, namely, that of Equal Protection of the Laws.[41]

This latter doctrine involves, in the field of right of Eminent Domain, the requirement: that if, and in so far as, exercise of that public right imposes upon a private individual a peculiar burden, which in justice should not be borne, by him alone, that burden shall be removed, or limited (as between individuals, or as to other private property res), by compensation raised by taxation from the proper class of private individuals or of private property res,—such class (in a particular instance) including, or not including, (according to the circumstances), the whole public for whose benefit the public right is enforced.

In a given instance, the private person as against whom the public right is enforced, may himself be (personally, or through other property of his) a member of such class, and may thereby be required to contribute to his own compensation; with the net result of a requirement (for Equality) of only partial net compensation to him. Indeed, such person (individually, or through property of his) might perfectly well happen to constitute, solely, and by himself, the whole class required to contribute to the burden.

In fact, in such a situation, the betterment-assessment (there being no limit to the Legislative discretion in respect of amount) might be equal to the whole amount of the required gross compensation.

§ 399. The Question of Public Requirement and Use.

Upon the question whether, upon a particular taking, Federal or State, the proposed use represents a proper public requirement, there is a broad (Federal or State) Legislative discretion; although, in the last resort, the matter is of exclusive Federal Judicial Jurisdiction, whether the taking be Federal or State.[42]

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[41]See §§ 497-499.

[42]Shoemaker v. United States, 147 U. S. 282; S 13:361; L 37:170 (parks in the District of Columbia); United States v. Gettysburg Elec. Ry., 160 U. S. 668; S 16:427; L 40:576 (valid Congressional taking for the Gettysburg National Park); Fallbrook Irrig'n Dist. v. Bradley, 164 U. S. 112; S 12:56; L 41:369 (State taking, for irrigation purposes); O'Neill v. Leamer, 239 U. S. 244; S 36:54; L 60:249 (State Drainage project); other cases cited below.

It is not essential that the proposed benefit and use be directly in favor of, or by, the public in its organized capacity. A proposed benefit and use, immediately to or by private individuals, natural or artificial, may, in an indirect operation, be, in legal contemplation, a benefit to, or use by, the public.[43]

§ 400. Private Contribution.

The fact of contribution to the cost by private persons more particularly, and primarily, interested, is not inconsistent with public character in the proposed use.[44]

§ 401. Equitable Aspect.

In the field in question, Equitable considerations or Equitable principles are applied where substantial justice so requires. Thus, where a municipal corporation, by mistake as to title, built a school-house upon land wrongly supposed to be owned by the corporation, and, thereafter, upon learning of the mistake, took the true owner's title by Eminent Domain, the latter was not entitled to compensation for the value of the school-house.[45]

So, when a corporation made improvements upon land, as mortgagor, and thereafter took the mortgagee's title under Eminent Domain.[46]

§ 402. Analogy between Eminent Domain and Taxation.

From what has been said above, it follows that there is a close analogy between (a) Eminent Domain and (b)

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[43]Head v. Amoskeag Mfg. Co., 113 U. S. 9; S 5:441; L 28:880 (mill-flowage); Clark v. Nash, 198 U. S. 361; S 25:676; L 49:1085; (private irrigation flowage); Strickley v. Highland Boy Mining Co., 200 U. S. 527; S 26:301; L 50:581; (bucket-line easement of way in favor of one mining-tract over another tract); Hairston v. Danville etc. Ry., 208 U. S. 598; S 28:331; L 52:637; Union Lime Co. v. Chicago & Northw. Ry., 233 U. S. 211; S 34:522; L 58:924; (spur tracks, primarily for reaching the premises of a particular shipper of freight); Mt. Vernon Cotton Co. v. Alabama Power Co., 240 U. S. 30; S 36:234; L 60:507: (taking through Water Company for public use).

[44]Shepard v. Barron, 194 U. S. 553; S 24:737; L 48:1115; Hairston v. Danville Ry., cited above; Union Lime Co. v. Chicago & Northw. Ry., cited above.

[45]Searl v. School District, 133 U. S. 553; S 10:374; L 33:740.

[46]Consolidated Turnpike Co. v. Norfolk etc. Ry., 228 U. S. 596; S 33:605; L 57:592.

Taxation. In each case, the public has, and exercises, the right of taking from private individuals so much of the property held by them as the public needs.[47]

The only fundamental difference is: that in Taxation the requirement of Equality applies itself automatically; while in taking by Eminent Domain, Taxation needs commonly to be invoked, for the effectuating of Equality (through compensation.)[48]

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[47]The generally prevailing modern practice of requiring and accepting a money equivalent, being a mere detail. Thus, tithes were formerly (and are still, in theory), required, and taken, in kind.

[48]See § 398.

CHAPTER LXIV.

CERTAIN SPECIFIC FIELDS OF FEDERAL PUBLIC POLICY:—MONOPOLY AND RESTRAINT OF TRADE; SHIPMENT OF INTOXICATING LIQUORS; CONTRACT.[1]

§ 403. Scope of the Chapter.

At a later point we shall consider the Federally adopted Common Law doctrine of Public Policy from the standpoint of its Interpretative or definitory operation (expansive or limitative) upon the letter of the Due Process texts, and other like texts of the Constitution.[2]

It is proposed, in the present Chapter, to consider certain specific fields of Federal Policy.

§ 404. Monopoly and Restraint of Trade.

1. AT THE COMMON LAW.—Beginning at an extremely early period in English history, there had been developed, in England, and, later, in this country, prior to the Sherman Act, so-called, a highly elaborated system of Public Policy, adverse to Monopoly and undue Restraint of Trade. The system existed, in substantial uniformity, in England; in our States and Federal States; and in the intra-State Federal Jurisprudence, in so far as the Federal Judiciary had to deal with the matter.[3]

The Common Law of this subject, in England, and in our States and Federal States, in general, was of both Civil and Criminal character. In the general Federal field, above referred to, the feature of Criminal Procedure was (owing to absence of Congressional action) not present. At this stage, these Common Law principles—like the Common Law in general—prevailed in Federal area, except where, or in so far as, modified by legislation of local operation; and there seems to be no reason to doubt that they were operative, (as far as Federal Judicial power extended in the absence of specific action of Congress), within the sev-

[1]See also §§ 409; 431; and under specific heads.

[2]§§431-434.

[3]Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64; L 22:315. See particularly, pp. 66 et seq.

eral States, to the extent of absence of State competency.[4]

2. THE SHERMAN ACT.[5]—Following the precedent of the Federal Constitution, and universal Congressional precedent and practice in dealing with Common Law fields (except where change was in terms specifically made), Congress, in the Sherman Act, took the Common Law of the subject as it found it, with its various particularizations and qualifications,[6] and simply made provision for Federal enforcement of those principles: (a) within State area proper, to the extent of the Federal Sovereignty therein; and (b) in Federal area, generally.[7]

Following such Constitutional and Congressional precedent and practice, the Act employed Common Law technical terms of the subject ("monopoly," "trade," "restraint of trade") respectively, in their technical Common Law sense; as also the Common Law technical terms "combination" and "conspiracy". Owing to the employment in the Constitution of the term "commerce" as a variant (with a certain possible degree of expansion) of the technical Common Law term "trade", the Sherman Act so employs the term "commerce".[8]

Owing to the broad scope, in this field, of exercise of Judicial judgment (closely approaching mere Economic view), Judicial decision, in this field deals, in large measure, with particulars of fact, and the applicability thereto of well settled Common Law principles; and owing to the great commercial and industrial importance, in particular instances, of transactions within or closely approaching the field in question, and to the magnitude of sums or values involved, there has been strenuous controversy upon,

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[4]E. g., in suprastate Commerce. See Oregon Steam Nav. Co. v. Winsor, cited above.

[5]What is said here and in the following section, is applicable, mutatis mutandis, to later Congressional legislation in the same field.

[6]Cincinnati Packet Co. v. Bay, 200 U. S. 179; S 26:208; L 50:428 (a certain agreement for withdrawal from business for a period of years, held not within the Sherman Act).

United States v. St. Louis Terminal, 224 U. S. 383; 236 U. S. 194; S 31:507; L 56:810; S 35:408; L 59:535: (separability of particular features, of action unlawful as a whole).

[7]Cases, generally, cited below.

[8]Cases, generally, cited below.

and detailed Judicial consideration of, differentiation of such particulars. The result, however, has been, simply, broad application of the familiar Common Law principles of the subject.[9]

§ 405. Illustration.

Forms of violation of the Sherman Act may, for practical convenience, be classified as follows:

(1) Agreements, in general, among natural competitors, for forcing up prices;[10] (2) Anti-cut rate agreements;[11] (3) Simulation of competition, for deception of vendees;[12] (4) Intimidation, boycotting, blacklisting, and the like;[13] (5) Temporary underselling, designed to force competitors out of business;[14] (6) Destruction of plants purchased;[15] (7) Consolidation aimed at, and tending to, monopoly or restraint of trade;[16] (8) Cornering of the market, in a particular field;[17] (9) Concert of action among respective possessors of portions of a natural monopoly (as, coal);[18] or among possessors of exclusive public franchises (as, rail-

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[9]See the following section.

As to absence, in the Sherman Act, of intent of operation in Foreign area, see American Banana Co. v. United States, 213 U. S. 347; S 29:511; L 53:826.

[10]Addyston Pipe Co. v. United States, 175 U. S. 211; S 20:96; L 44:136; Chattanooga Foundry v. Atlanta, 203 U. S. 390; S 27:65; L 51:241 (supplemental to the Addyston Pipe Case); Montague v. Lowry, 193 U. S. 38; S 24:307; L 48:608; Swift & Co. v. United States, 196 U. S. 375; S 25:276; L 49:518.

[11]Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373; S 31:376; L 55:502; Straus v. American Publishers' Ass'n, 231 U. S. 222; S 34:84; L 58:192.

[12]Chattanooga Foundry v. Atlanta, cited above.

[13]Loewe v. Lawlor, 208 U. S. 274; S 28:301; L 52:488; Continental Wall Paper Co. v. Voight, 212 U. S. 227; S 29:280; L 53:486; Lawlor v. Loewe, 235 U. S. 522; S 35:170; L 59:341.

[14]United States v. American Tobacco Co., 221 U. S. 106; S 31:632; L 55:663.

[15]Standard Oil Co. v. United States, 221 U. S. 1, 75; S 31:502; L 55:619.

[16]Standard Oil Co. v. United States; United States v. American Tobacco Co., both cited above.

[17]United States v. Patten, 226 U. S. 525; S 33:141; L 57:333 (cotton corner).

[18]United States v. Reading Co., 226 U. S. 324; S 33:90; L 57:243; 228 U. S. 158; S 33:509; L 57:779.

road franchises);[19] (10) Control of matters incidental to a principal field of commerce in question.[20]

The Act looks behind mere corporate existence. Thus, a corporation and its stockholders may be viewed as identical, in so far as effectual operation of the Act so requires.[21]

It is immaterial that the particular features of action are, severally, lawful, viewed by themselves; but a collocation of lawful features may be within the prohibition.[22]

Particular features, in and of themselves lawful, may, in a particular instance be separable, and, as separate features, not be within the Act.[23]

The fact that action, actual or proposed, is, or is to be partly outside of the Federal Realm does not exempt it, or a conspiracy looking thereto, from operation of the Act.[24]

Following the Common Law of the subject, the Act is not limited to any class or type of persons or of trade, but applies indifferently to all classes.[25]

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[19]United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290; S 17:540; L 41:1007; United States v. Joint Traffic Ass'n, 171 U. S. 505; S 19:25; L 43:259; Northern Securities Co. v. United States, 193 U. S. 197; S 24:436; L 48:679; Harriman v. Northern Securities Co., 197 U. S. 244; S 25:493; L 49:739 (supplemental to Northern Securities Co. v. United States, cited above); United States v. Union Pac. R. R., 226 U. S. 61; S 33:53; L 57:124; 226 U. S. 470; S 33:162; L 57:306; United States v. Pacific & Arctic Co., 228 U. S. 87; S 33:443; L 57:742.

[20]As, of tin-foil (used for wrappings),—in aid of a tobacco monopoly; United States v. American Tobacco Co., cited above.

[21]United States v. Union Pac. R. R., 226 U. S. 470, cited above, (holding that distribution of the stock of the subsidiary corporation to the stockholders of the holding corporation would, in the situation in question, defeat the intent of the Act).

[22]Swift & Co. v. United States; United States v. Reading Co., both cited above. Other cases, generally, cited in this section.

[23]United States v. St. Louis Terminal, 224 U. S. 383; S 31:507; L 56:810.

[24]United States v. Pacific & Arctic Co., cited above.

[25]As, to employees, boycotting or blacklisting manufacturers or employers (see Loewe v. Lawlor, 208 U. S. 274; S 28:301; L 52:488; Lawlor v. Loewe, 235 U. S. 522; S 35:170; L 59:341); and to blacklisting, by retailers, of wholesalers dealing direct with consumers. Eastern States Lumber Ass'n v. United States, 234 U. S. 600; S 34:951; L 58:1490.

Immediately beneficial result to the public (as, lowering of prices, by greater economies in production or in sale) does not justify acts otherwise within the Act; but the Public Policy in question looks beyond immediately-discoverable results.[26]

The Public Policy embodied in the Act extends to dealings in land, and to land title.[27]

The operation of the Act in favor of the injured parties is not confined to natural persons, or to private corporations, but extends to States and their governmental instrumentalities: as a State municipal corporation.[28]

§ 406. Congressional Public Policy in Aid of the Public Policy of a State or a Federal State:—The Wilson Act:—The Webb-Kenyon Act.

1. THE WILSON ACT, TAKEN BY ITSELF.[29]—The Wilson Act extends to Criminal and Penal, as well as to Civil, State enforcement of the local policy.[30]

It applies to liquors brought into a State from a Foreign

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[26]International Harvester Co. v. Missouri, 234 U. S. 199; S 34: 859; L 58: 1276.

[27]Shawnee Compress Co. v. Anderson, 209 U. S. 423; S 28: 572; L 52: 865; various other cases cited above.

[28]Chattanooga Foundry v. Atlanta, cited above.

United States v. E. C. Knight Co., 156 U. S. 1; S 15: 249; L 39: 325, contains nothing qualificatory of our text, but is a mere case of pleading; a situation within the Sherman Act apparently existed but was not effectually pleaded.

We may allude to the limitation of the threefold damages provision of the Sherman Act, to actions at law. Fleitmann v. Welsbach Co., 240 U. S. 27; S 36: 233; L 60: 505.

As to Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165; S 35: 398; L 59: 520, see § 407.

[29]Act of August 8, 1890:—

> That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

[30]In re Rahrer, 140 U. S. 545; S 11: 865; L 35: 572.

country, as well as to liquors brought in from an extra-State domestic area.[31]

It does not extend to liquors purchased for the purchaser's own consumption. In respect of such liquors, it does not vest, either (a) power of direct local control,[32] or (b) power of indirect State action by way of dealing with intertransportation.[33]

It does, however, vest power of indirect dealing with liquors purchased (or to be purchased) for such use, to the extent of vesting local power of inhibition (or of regulation) of local solicitation of such purchases,[34] thereby introducing, pro tanto, an exception to the general Federal principles applicable to such situation.[35]

It does not extend to liquors while in actual intertransit proper,[36] even where the intertransit is, by its own terms, terminable in a particular State,[37] or even in the case of C. O. D. sales in which the contract of sale was made outside of a State in question, and delivery there is to be made in the State of the contract of sale, by the vendor to a carrier as agent of the purchaser.[38]

A fortiori, it does not extend to liquors merely passing through a State or such a Federal area in the course of intertransit.[39]

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[31]De Bary v. Louisiana, 227 U. S. 108; S 33:239; L 57:441.

[32]Vance v. W. A. Vandercook Co. (No. 1), 170 U. S. 438; S 18: 645; L 42:1111; Rossi v. Pennsylvania, 238 U. S. 62; S 35:677; L 59:1201.

[33]Louisville & Nashv. R. R. v. Cook Brewing Co., 223 U. S. 70; S 32:189; L 56:355.

[34]Delamater v. South Dakota, 205 U. S. 93; S 27:447; L 51:724.

[35]As to which, see §§ 212; 492-495.

[36]I. e., Intertransit apart from conventional extension thereof by the Original Package doctrine.

[37]American Ex. Co. v. Iowa, 196 U. S. 133; S 25:182; L 49:417: (explaining O'Neil v. Vermont, 144 U. S. 323; S 12:693; L 36:450); Adams Ex. Co. v. Iowa, 196 U. S. 147; S 25:185; L 49:424; Heyman v. Southern Ry., 203 U. S. 270; S 27:104; L 51:178.

[38]Cases last above cited.

As to the C. O. D. feature generally, from the standpoint of intertransit and of sale and delivery, see §§ 211, 212.

[39]Rhodes v. Iowa, 170 U. S. 412; S 18:664; L 42:1088.

It does not affect, in any way, the matter of State authority over goods after intertransit has ceased.[40]

In respect of liquors purchased for the purchaser's own use, it does not vest in carriers discretion or power (not previously existing) of refusal of transportation under sales not covered by the Wilson law.[41]

The Act embraces sales made within State (or Federal State) waters, upon a vessel engaged at the time in intertransit, but, at the time of sale, at rest in such waters, pursuant to the course and plan of her voyage.[42]

2. THE WEBB-KENYON ACT.[43]—What has been said of the Wilson Act is applicable, mutatis mutandis, to the Webb-Kenyon Act.[44]

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[40]Pabst Brewing Co. v. Crenshaw, 198 U. S. 17; S 25:552; L 49:925; Phillips v. Mobile, 208 U. S. 472; S 28:370; L 52:578; (applying to such situation the doctrine of the cases last cited).

[41]Louisville & Nashv. R. R. v. Cook Brewing Co., cited above.

[42]Foppiano v. Speed, 199 U. S. 501; S 26:138; L 50:288.

As to excessive State license fees as violative of suprastate Commerce principles, see Rosenberger v. Pacific Ex. Co., 241 U. S. 48; S 36:510; L 60:880 (arising prior to the Webb-Kenyon Act).

[43]Act of March 1, 1913:—

> That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

[44]Adams Ex. Co. v. Kentucky, 238 U. S. 190; S 35:824; L 59:1267 (the Webb-Kenyon Act operative only where the proposed use is violative of specific law of the consignee's State, dealing with alcoholic liquors; not qualificatory, in and of itself, of the general suprastate Commerce law). As to the feature, in this case, of following State decision upon State law, see other citation of the case.

§ 407 In the Field of Contract.[45]

It may be proper to cite certain cases illustrative of the Federal tacit adoption (for Federal occasions) of the general Common Law conception and principles of Public Policy in the field of Contract.[46]

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[45]As to Congressional legislation, see § 409 (assignment of claims against the United States); §§ 731-733 (suit by assignee of claim).

See also §§ 780-781 (motive or intent in respect of effecting or of defeating Federal Original Jurisdiction).

[46]The cases cited in this note arose in Federal Original Jurisdiction.

Marshall v. Baltimore & O. R. R., 16 How. 314; L 14:953; Trist v. Child, 21 Wall. 441; L 22:623; Hazelton v. Sheckells, 202 U. S. 71; S 26:567; L 50:939; (contract for lobbying before Congress or before a State Legislature).

Tool Co. v. Norris, 2 Wall. 45; L 17:868; Meguire v. Corwine, 101 U. S. 108; L 25:899; (contract for procuring a Government contract, or Government employment).

Hume v. United States, 132 U. S. 406; S 10:134; L 33:393; (contract fraudulent towards the United States; quantum meruit, not contract price, allowed: Court of Claims).

Clark v. United States, 102 U. S. 322; L 26:181: non-liability of the United States, in the Court of Claims, for the amount (actually received by the United States) of a bribe given to a Federal official.

Hanauer v. Doane, 12 Wall. 342; L 20:439; (note for price of goods destined for an enemy of the United States).

McMullen v. Hoffman, 174 U. S. 639; S 19:839; L 43:1117; (secret combination between bidders for a State municipal corporation contract).

Oscanyan v. Arms Co., 103 U. S. 261; L 26:539; (contract involving disloyalty of an agent here of a Foreign government).

West v. Camden, 135 U. S. 507; S 10:838; L 34:254; (contract involving disloyalty of a director to his corporation).

Woodstock Iron Co. v. Extension Co., 129 U. S. 643; S 9:402; L 32:819; (contract involving fraud upon third person).

Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 137; S 11:512; L 35:116; (agreement of ouster of Judicial relief). See also Pope Mfg. Co. v. Gormully, 144 U. S. 224; S 12:632; L 36:414.

Burt v. Union L. Ins. Co., 187 U. S. 362; S 23:139; L 47:216; (death of insured, by execution, for crime, not within an insurance policy, general in terms).

As to Congressional anti-monopoly legislation as a defence to suit against a purchaser, see Connolly v. Union Sewer Pipe Co., 184 U. S. 540; S 22:431; L 46:679; Continental Wall Paper Co. v. Voight, 212 U. S. 227; S 29:280; L 53:486; Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165; S 35:398; L 59:520.

CHAPTER LXV.

EXECUTORY CONTRACT TO WHICH THE UNITED STATES IS A PARTY:—ASSIGNMENT OF CLAIMS AGAINST THE UNITED STATES.[1]

§ 408. Contracts.

1. Executory contracts to which the United States is a party are, in general, in the absence of Congressional provision to the contrary, governed by the Common Law of Contract: as, in respect of voidability, as against the United States, by duress practiced by its officer or agent acting in the matter;[2] in respect of beneficiaries contemplated in official bonds running to the United States;[3] in respect of limitation or burden upon the United States as a purchaser, holder, or acceptor, of commercial paper;[4] in respect of release of a surety, by changes in the contract;[5] in respect of presumptions of regularity, and of valid execution;[6] in respect of validity, as Common Law contracts, of instruments given as and for statutory official bonds or other contracts, but either not sealed or otherwise

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[1]As to Executed contracts, see Land, Purchase of and Disposal of, by the United States (§§ 116-121).

[2]United States v. Tingey, 5 Pet. 115; L 8: 66.

[3]Howard v. United States, 184 U. S. 676; S 22: 543; L 46: 754; Lammon v. Feusier, 111 U. S. 17; S 4: 286; L 28: 337.

As to material-men's bonds, and the like, in which the United States is concerned, see Guaranty Co. v. Pressed Brick Co., 191 U. S. 416; S 24: 142; L 48: 242; Hill v. American Surety Co., 200 U. S. 197; S 26: 168; L 50: 437; United States Fidelity Co. v. Kenyon, 204 U. S. 349; S 27: 381; L 51: 516; Hardaway v. National Surety Co., 211 U. S. 552; S 29: 202; L 53: 321; Davidson Marble Co. v. Gibson, 213 U. S. 10; S 29: 324; L 53: 675; Title Guaranty etc. Co. v. Crane Co., 219 U. S. 24; S 31: 140; L 55: 72.

[4]United States v. Barker, 12 Wh. 559; L 6: 728; United States v. Bank of the Metropolis, 15 Pet. 377; L 10: 774.

[5]United States v. Freel, 186 U. S. 309; S 22: 875; L 46: 1177.

[6]As, a presumption that seals appearing upon a bond were placed there by the obligors (Moses v. United States, 166 U. S. 571; S 17: 682; L 41: 1119); and that an instrument was complete when signed by a surety (Butler v. United States, 21 Wall. 272; L 22: 614).

not complying with statutory requirements;[7] in respect of implied contract, generally, in favor of the United States;[8] in respect of concurrence, as against sureties, of a bond and such implied contract;[9] in respect of estoppel of an official receiving moneys as and for public moneys, to deny, as against the United States, public character;[10] in respect of requirement, in a deed of land from the United States, of a recital of the authority of the Federal officer executing the deed;[11] in respect of incapacity of public officials to bind the United States in contract as promisor otherwise than in such manner as has been specifically provided for by law;[12] in respect of presumption, however, of implied authority in high officials, of waiver, in details, of strict compliance with contract requirements;[13] and in respect of the peculiar absolute responsibility (in the absence of Congressional relaxation thereof) of public accounting officers and their sureties,[14] including incapacity of such official to

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[7]United States v. Bradley, 10 Pet. 343; L 9:448; United States v. Linn, 15 Pet. 290; L 10:742; Osborne v. United States, 19 Wall. 577; L 22:208; Jessup v. United States, 106 U. S. 147; S 1:74; L 27:85; Eastern R. R. v. United States, 129 U. S. 391; S 9:320; L 32:730; Moses v. United States, 166 U. S. 571; S 17:682; L 41:1119; United States v. Dieckerhoff, 202 U. S. 302; S 26:604; L 50:1041.

[8]As, in implied contract, of an accounting official, to make good a defalcation in excess of his bond. Walton v. United States, 9 Wh. 651; L 6:182.

[9]Case last cited.

[10]King v. United States, 99 U. S. 229; L 25:373; Potter v. United States, 107 U. S. 126; S 1:524; L 27:330.

[11]United States v. Jonas, 19 Wall. 598; L 22:177; United States v. National Exchange Bank, 214 U. S. 302; S 29:665; L 53:1006.

[12]Russell v. United States, 182 U. S. 516; S 21:899; L 45:1210; Hooe v. United States, 218 U. S. 322; S 31:85; L 54:1055.

As to implied authority, under certain conditions, see United States v. Macdaniel, 7 Pet. 1; L 8:587; United States v. Ripley, 7 Pet. 18; L 8:593; United States v. Fillebrown, 7 Pet. 28; L 8:596.

[13]Clark v. United States, 95 U. S. 539; L 24:518; United States v. United Engineering Co., 234 U. S. 236; S 34:843; L 58:1294; Maryland Steel Co. v. United States, 235 U. S. 451; S 35:190; L 59:312; United States v. New York & Porto Rico S. S. Co., 239 U. S. 88; S 36:41; L 60:161.

[14]United States v. Robeson, 9 Pet. 319; L 9:142; United States v. Laub, 12 Pet. 1; L 9:977; United States v. Linn, 15 Pet. 290; L 10:742; United States v. Prescott, 3 How. 578; L 11:734; United States v. Morgan, 11 How. 154; L 13:643; United States v. Dashiel, 4 Wall.

create a counter-credit in his own favor, by paying a debt of the United States.[15]

2. The Common Law principles of lex loci (as among States and Federal States), operative upon private contracts, have no operation upon executory contracts of the United States.[16]

In this field, the local contract law of the Seat of Government (the District of Columbia) has no peculiar operation, but stands like contract law of a State, even where a contract in question is, in a certain sense, made at the Seat of Government.[17]

§ 409. Assignment of Credits or Claims Against the United States.

Apart from action of Congress in the field in question, the matter of assignment of a credit or claim held by a private person against the United States would—pursuant to the principles of the preceding section—be governed by general Common Law principles. Congress has, however, over a long period, dealt broadly with the matter, partly with a view to mere public convenience, and to certainty in accounting;[18] partly from the view of danger of intro-

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182; L 18:319; United States v. Gilmore, 7 Wall. 491; L 19:282; Boyden v. United States, 13 Wall. 17; L 20:527.

[15]United States v. Keehler, 9 Wall. 83; L 19:574.

As to exception to the principles of absolute liability, in case of seizure by an enemy, see United States v. Thomas, 15 Wall. 337; L 21:89.

See various Acts of Congress, relaxing the principle.

[16]Arcambel v. Wiseman, 3 Dal. 306; L 1:613; Cox v. United States, 6 Pet. 172; L 8:359; Duncan v. United States, 7 Pet. 435; L 8:739; Dair v. United States, 16 Wall. 1; L 21:491; Butler v. United States, 21 Wall. 272; L 22:614; United States v. Andrews, 207 U. S. 229; S 28:100; L 52:185; Ceballos v. United States, 214 U. S. 47; S 29:583; L 53:904; United States v. National Exchge. Bank, 214 U. S. 302; S 29:665; L 53:1006; Mankin v. Ludowici Co., 215 U. S. 533; S 30: 174; L 54: 315.

[17]United States v. Andrews, cited above.

As to presumption of Federal concession to local law, in certain classes of executed contracts, see Land, Purchase of and Disposal of, by the United States (§§ 116-121).

[18]Goodman v. Niblack, 102 U. S. 556, 560; L 26:229; Hobbs v. McLean, 117 U. S. 567, 576; S 6:870; L 29:940.

duction of improper influence, through the introduction of strangers.[19]

This legislation is, (as the reason of the thing requires), not limited to claims based upon contract, but—subject to certain exceptions to be referred to below—is general in character[20] and is not limited to forms, modes, or particulars of enforcement of claims or of seeking relief; but operates directly upon a claim, as a claim.[21]

The legislation extends to mortgage assignment.[22]

It is viewed as not intended to operate upon (and, perhaps could not, consistently with the Federal Organic law of Property, have operation upon) such claims, present or prospective, as are, in their nature, estates in land (the typical example being rent due or to fall due from the United States as lessee);[23] and as not extending to assignments by operation of law (as, Bankruptcy assignments),[24] or to State Judicial Insolvency assignments;[25] or to voluntary Common Law general assignments for creditors;[26] or to transfer by or under Judicial Procedure, in general,[27] except where such Judicial Procedure is mere matter of enforcement (as, by mortgage foreclosure), of a voluntary assignment made in violation of the Act.[28]

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[19]Spofford v. Kirk, 97 U. S. 484, 490; L 24: 1032; Goodman v. Niblack, cited above.

This latter aspect appears in the fact (considered below)of prohibitory operation of the legislation in question, as between assignor and assignee.

[20]E. g., it covered a claim presented in the Court of Claims under an Act of Congress providing for indemnity for cotton seized under the Abandoned and Captured Property Act of March 12, 1863, for and as property of a person other than the claimant. United States v. Gillis, 95 U. S. 407; L 24: 503. See, also, Goodman v. Niblack, cited above; St. Paul, Duluth R. R. v. United States, 112 U. S. 733; S 5: 366; L 28: 861; National Bank of Commerce v. Downie, 218 U. S. 345; S 31: 89; L 54: 1065.

[21]Cases, generally, cited in this Chapter.

[22]St. Paul & Duluth R. R. v. United States, cited above.

[23]Freedmen's Saving etc. Co. v. Shepherd, 127 U. S. 494; S 8: 1250; L 32: 163.

[24]Erwin v. United States, 97 U. S. 392; L 24: 1065.

[25]Butler v. Gorely, 146 U. S. 303; S 13: 84; L 36: 981.

[26]Goodman v. Niblack, cited above.

[27]Price v. Forrest, 173 U. S. 410; S 19: 434; L 43: 749.

[28]St. Paul & Duluth R. R. v. United States, cited above.

The view has been suggested (Hobbs v. McLean, 117 U. S. 567,

The legislation operates not only as between the private persons in question, and the United States, but—for effectual enforcement of the principle of Federal Public Policy in question—as between assignor and assignee.[29]

The legislation in question does not make an actual assignment absolutely void, to all intents; but—being intended solely for the protection of the United States—recognizes an actual assignment to this intent: that the United States may waive the benefit of the legislation, and deal with, and make payment to, the assignee.[30]

In this field, the Common Law principles of severability are operative.[31]

Other Congressional legislation dealing with the same general field, is construed in the same spirit.[32]

575, 576; S 6:870; L 29:940) that the Act is limited in its aim and scope to claims existing at the time of the assignment.

[29]Spofford v. Kirk, cited above; Ball v. Halsell, 161 U. S. 72; S 16:554; L 40:622; Nutt v. Knut, 200 U. S. 12; S 26:216; L 50:348; National Bank of Commerce v. Downie, 218 U. S. 345; S 31:89; L 54:1065.

[30]Bailey v. United States, 109 U. S. 432; S 3:272; L 27:988.

[31]A certain contract (embracing a power of attorney) between two private individuals, providing, in respect of a certain claim against the United States: (a) for contingent compensation, equal to a certain percentage on the amount collected, and (b) for a lien, for such sum, on the proceeds, was held, upon the facts, invalid as to the lien feature (i. e., invalid as against the United States) but valid as between the parties in respect of the compensation agreement. Nutt v. Knut, cited above.

[32]Hager v. Swayne, 149 U. S. 242; S 13:841; L 37:719; Ball v. Halsell, cited above; Burdon Sugar Co. v. Payne, 167 U. S. 127; S 17:754; L 42:105.

CHAPTER LXVI.

THE "ORIGINAL PACKAGE" DOCTRINE.

§ 410. General Statement of the Doctrine.

If, at the termination of physical transit to a purchaser-consignee, of goods designed for re-sale, the goods are in a form of packing not consistent with the proposed (and the ultimate actual) form of marketing them in the usual course of trade, but are in barrels or boxes, or are baled, or are in other package form, which must be broken up prior to such marketing; then, and in such case, the journey is, to certain intents, conventionally viewed, by the Federal law, as not at an end, but as still continuing, during continuance of such physical situation.

The Federal doctrine of this subject is commonly characterized as the "Original Package" doctrine.

§ 411. Particulars of the Doctrine.

Certain particulars of the doctrine may be stated as follows:

(1) The doctrine operates broadly to continue the Federal Sovereignty up to the breaking of the original package, in so far as that Sovereignty is based upon transit (as in the case of import taxes, or of intercommerce).[1]

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[1]Brown v. Maryland, 12 Wh. 419; L 6:678: invalidity of State law requiring importers from abroad to take out a license as a condition of selling in the original package.

Low v. Austin, 13 Wall. 29; L 20:517; (invalidity of State taxation upon goods imported from abroad while in the original package, and in the hands of the importer).

Cook v. Pennsylvania, 97 U. S. 566; L 24:1015; (invalidity of State tax on auctioneers' sales of such goods, so held, and in the original package).

Leisy v. Hardin, 135 U. S. 100; S 10:681; L 34:128; invalidity, pro tanto, of a State statute requirement of a license for sale of beer in kegs, as brought in from another State, and in the hands of the original consignee-purchaser, (over-ruling Thurlow v. Massachusetts; Fletcher v. Rhode Island, and Peirce v. New Hampshire, reported together, 5 How. 504; L 12:256, as "License Cases").

Hipolite Egg Co .v. United States, 220 U. S. 45; S 30:364; L 55:364 (the Federal Pure Food legislation, in so far as limited to goods

(2) It operates in aid and in furtherance of the Federal Sovereignty, in so far as Federal action deals with goods from the standpoint of the form of grouping or packing: as in many particulars of Federal Internal Revenue laws.

(3) Incidentally,—and in furtherance of Federal Sovereignty and Federal polity, as above considered—the doctrine operates in favor of a purchaser-consignee, to protect the goods (and such owner in respect thereof) as against State action.[2]

It has no such operation in favor of a vendee of the original purchaser-consignee.[3]

(4) The doctrine looks to substance, not to form. It is only such packing or grouping of articles as is in and for the ordinary course of commercial requirements that constitutes original package (within the meaning of the doctrine) in favor of a purchaser-consignee and for protection against local laws.[4]

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in transit, is operative upon them so long as they are in the original package, in the hands of the original purchaser and consignee).

See also Schollenberger v. Pennsylvania, 171 U. S. 1; S 18:757; L 43:49; McDermott v. Wisconsin, 228 U. S. 115; S 33:431; L 57:754.

[2]Brown v. Maryland; Low v. Austin; Cook v. Pennsylvania; Leisy v. Hardin; all cited above.

[3]Waring v. Mayor, 8 Wall. 110; L 19:342.

[4]May v. New Orleans, 178 U. S. 496; S 20:976; L 44:1165; Austin v. Tennessee, 179 U. S. 343; S 21:132; L 45:224; Cook v. Marshall County, 196 U. S. 261; S 25:233; L 49:471; Purity Extract Co. v. Lynch, 226 U. S. 192; S 33:44; L 57:184.

CHAPTER LXVII.

MONEY.—BILLS OF CREDIT.

§ 412. Money, Generally.

The Constitution specifically vests in Congress the power "to coin money", and to "regulate the value thereof, and of foreign coin",[1] and provides that no State shall "coin money; emit bills of credit" or "make anything but gold and silver coin a tender in payment of debts".

§ 413. Change of Standards.

In accordance with a Common Law conception, and with Common Law practice, in England, the amount of bullion in a class of coin, of a particular designation, may be lowered or increased, by Congress, at will, or at least within a broad field of discretion; and this may be operative upon existing contracts,—the actual operation upon such contracts being reconciled with Federal Organic Contract law on the theory that contracts for future payment of money mean money as it shall be at the time fixed for payment.[2]

There is, however, nothing contrary to Federal Public Policy in a stipulation for payment in coin of a specified weight and fineness. That is to say, coin may, pro tanto, be treated as bullion.[3]

§ 414. Change of Sovereignty, and Thereby of Money System.

The inherent adaptiveness of the Common Law conception is brought into clear view by the situation that arises when, by change of the prevailing money system, (as in the case of a change of Sovereignty), the doctrine of identity in fact through identity of name, is not capable of applica-

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[1]For a case of Congressional fixing of value of foreign coins (for Custom House purposes), see Collector v. Richards, 23 Wall. 246; L 23: 95.

[2]San Juan v. St. John's Gas Co., 195 U. S. 510; S 25:108; L 49: 299.

[3]Bronson v. Rodes, 7 Wall. 229; L 19:141; Butler v. Horwitz, 7 Wall. 258; L 19:149; Dewing v. Sears, 11 Wall. 379; L 20:189; Trebilcock v. Wilson, 12 Wall. 687; L 20:460.

tion. In such situation, the question of the money of performance is settled by the presumed intent of the parties, and by the application of Equitable principles.[4]

§ 415. Different Types of Nominally One Coin.

It is competent to Congress to maintain, for a coin of a given designation, coins of different bullion value (as, gold and silver dollars) and,—in view of the attitude of the government towards them respectively—of different purchasing value; with the result that a debtor may be at liberty to pay in either kind.[5]

§ 416. Congressional Power of Delegation.

Congress may delegate its coinage power to a Federal State.[6]

§ 417. Legal Tender Paper Money.

1. GENERALLY.—Continuously, prior to the Constitution of the United States, the United States had exercised, through Congress, power of issuing irredeemable paper money and of making it legal tender.[7]

The Constitution did not deal with the matter specifically; and did not, in legal effect, diminish the Federal power in this respect, but left it in full force.[8]

2. ANALOGIES TO COIN.—What has been said, in other sections, of value of coin, and of coin as a commodity, is true, mutatis mutandis, of paper money.[9]

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[4]Serralles' Succession v. Eshri, 200 U. S. 103; S 26:176; L 50:391.

[5]Trebilcock v. Wilson, 12 Wall. 687; L 20:460.

[6]E. g., to the Philippine Islands. Ling Su Fan v. United States, 218 U. S. 302; S 31:21; L 54:1049.

[7]§ 12.

[8]Legal Tender Cases, 12 Wall. 457; L 20:287; Dooley v. Smith, 13 Wall. 604; L 20:547; Railroad v. Johnson, 15 Wall. 195; L 21:178; Maryland v. Railroad, 22 Wall. 106; L 22:713; Legal Tender Case, 110 U. S. 421; S 4:122; L 28:204; (overruling Hepburn v. Griswold, 8 Wall. 603; L 19:513).

[9]Pacific Ins. Co. v. Soule, 7 Wall. 433; L 19:95; the United States may tax income received in coin as of the (greater) paper amount, in dollars.

The Vaughan, 14 Wall. 258; L 20:807; a liability payable in gold coin may result in a judgment in depreciated money, for a correspondingly greater number of dollars.

§ 418. Money as a Commodity.

Congress may deal with money (of actual bullion value) on the footing of a commodity. Thus, where a given type of coin is worth, as bullion, for export, more than its face value, the export of it may be forbidden.[10]

§ 419. State Bills of Credit.[11]

The definition, for the purposes of the field now in question, of Bills of Credit, is fixed by Common Law definition and conception.[12]

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[10]Ling Su Fan v. United States, 218 U. S. 302; S 31:21; L 54: 1049; (export from the Philippine Islands).

So, the Government, during the period of depreciated paper money, bought coin with currency, in the market. Trebilcock v. Wilson, 12 Wall. 687, 697; L 20:460. So, as to requirement of payment of customs duties in gold. (Ibid).

[11]See § 412.

[12]Craig v. Missouri, 4 Pet. 410; L 7:903; Briscoe v. Bank of Kentucky, 11 Pet. 257; L 9:709; Darrington v. State Bank of Alabama, 13 How. 12; L 14:30; Houston etc. R. R. v. Texas, 177 U. S. 66; S 20:545; L 44:673.

CHAPTER LXVIII.

Municipal Corporations, Federal or State.[1]

§ 420. As between a Municipal Corporation and Its Sovereign or Quasi-Sovereign, Federal or State.

Municipal corporations, as such, are viewed by the Federal law as mere instrumentalities of government of the home Sovereignty or quasi-Sovereignty, and, as such, as within its authority. Thus, State charters of such corporations are not within the Impairment clause.[2]

A State (or a Federal State) may consolidate, at pleasure, two or more such corporations;[3] may subject such a corporation to indebtedness for existing claims against it, not legally binding, but of meritorious character;[4] has full power over its municipal corporations in respect of the cost of freeing bridges from tolls,[5] and in respect of title acquired by such a corporation;[6] and may, as against one of its municipal corporations, cancel a contract—favorable to such corporation—between the corporation and a third person;[7] and may fix a maximum length of working day for employees of such corporations.[8]

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[1]As to absence of Immunity from private suit, see Sovereign, Immunity of from Suit (§ 612).

As to partaking of Sovereignty, to certain intents, see Immunity of the United States or of a State.

[2]Covington v. Kentucky, 173 U. S. 231, 241; S 19:383; L 43:679; Hunter v. Pittsburgh, 207 U. S. 161; S 28:40; L 52:151.

[3]Hunter v. Pittsburgh, cited above.

[4]Thompson v. Perrine, 103 U. S. 806; L 26:612; Quincy v. Cooke, 107 U. S. 549; S 2:614; L 27:549; Williamson v. New Jersey, 130 U. S. 189; S 9:453; L 32:915; Kies v. Lowrey, 199 U. S. 233; S 26:27; L 50:167; Stewart v. Kansas City, 239 U. S. 14; S 36:15; L 60:120.

[5]Williams v. Eggleston, 170 U. S. 304; S 18:617; L 42:1047.

[6]Essex Public Road Board v. Skinkle, 140 U. S. 334; S 11:790; L 35:446.

[7]Worcester v. Street Ry., 196 U. S. 539; S 25:327; L 49:591.

[8]Atkin v. Kansas, 191 U. S. 207; S 24:124; L 48:148.

§ 421. Areal Extension or Diminution:—Re-Organization:—Abolition.

Where the original area of a municipal corporation has been divided among two or more new such corporations, existing indebtedness is, under familiar principles of Equity, allottable among, and enforceable among, the new corporations, proportionately, pursuant to the principles of vested right in existing Remedy.[9]

Those principles are operative, to a like result, in case of pure annulment of the charter of a municipal corporation, without establishment of a new corporation or new corporations.[10]

§ 422. Quasi-Municipal Corporations.

Various forms of corporations, more or less akin to municipal corporations, are viewed by the Federal law as partly public and partly private, and are dealt with in one or in the other aspect, accordingly.[11]

§ 423. A Municipal Corporation as Potentially, to Certain Intents, a Private Corporation.

Just as a State may, at its pleasure, take on, to certain intents, the character of a private corporation, losing, pro tanto, its strictly Sovereign character,[12] so a municipal corporation may, by law of its home area, possess double character, public and private.[13]

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[9]§§ 505, 506. [10]§ 501.

[11]Thus, in Vincennes University v. Indiana, 14 How. 268; L 14: 416, a grant of land from a Territory to a corporation created by the Territory for educational purposes, was held not subject to revocation,—the corporation in question being viewed as, pro tanto, a private corporation.

[12]§§ 153; 612.

[13]Where a Charity (in the technical sense) was founded for the benefit of the individual members of a certain municipal corporation and other inhabitants of its area; and the founder designated the municipal corporation as his trustee, (the corporation being capable, by the State law, of accepting the trust), the corporation stood on the footing upon which a private individual would have stood, if made trustee; and such status of the trustee was, thereby, private, not public, even though the municipal corporation had power to provide, from its treasury, a like benefit to such citizens and inhabitants. Snyder v. Bettman, 190 U. S. 249; S 23: 803; L 47: 1035; (holding the trust fund not within State Immunity from Federal taxation, but Federally taxable as private property).

§ 424. Features and Incidents of the Private Aspect.

In their private (not strictly governmental) aspect, municipal corporations stand upon the footing of private corporations in general; as, in respect of Contract, Tort, Criminal liability, Waiver and Estoppel, and de facto existence or status of such a corporation or of its officials.

This subject is one either of local law,[14] or of general (not Federal) law;[15] and is therefore not within our field of study.[16]

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[14]As, in respect of power of a municipal corporation of a State, to make a certain contract claimed by the municipal corporation to be invalid as ultra vires (Cleveland v. Cleveland City Ry., 194 U. S. 517; S 24:756; L 48:1102); and of power of a municipal corporation in regard to granting street railway franchises and the like. Blair v. Chicago, 201 U. S. 400; S 26:427; L 50:801.

[15]Many cases cited in the Federal Digests.

See §§ 681-684 (Federal Question); §§ 688-697 (Following State Decisions).

[16]As to certain aspects of the matter, however, see preceding sections.

BOOK V.

DUE PROCESS OF LAW:—SUBSTANTIVE ASPECT.

PART I.—Certain General Considerations.

PART II.—The Federal Conception and Definition of Property (as Res, or as Title);—Contract-Right as Property;—Franchise as Property.

PART III.—The Federal Conception and Definition of Liberty.

PART IV.—Equal Protection of the Laws: (as Guaranteed in Terms, by the Fourteenth, and in Legal Effect, by the Fifth Amendment).

PART V.—Right in and to Existing Remedy (Judicial, or in Pais) as an Incident, and as a Feature, of Particular Substantive Rights.

PART I.

CERTAIN GENERAL CONSIDERATIONS.

CHAPTER LXIX.

The Due Process Texts:—General View.

§ 425. Prefatory:—Scope of the Present Book.

In respect of Due Process of Law, the Constitution looks —for definition of the term, and of the conception—partly to Substantive law; partly to law of Procedure (Legislative, Executive or Judicial).[1]

Thus, in respect of a particular alleged property-right (alleged to exist, and to have been invaded, or threatened), the question of existence, and of definition, of the alleged property-right is a question of Substantive law (Federal or State); while the question of invalidity, in other respects, of the actual or threatened public action (Federal or State) is a question of Procedure, (Legislative, Executive, or Judicial, as the case may be). In the present Book of our treatise, the matter is to be considered from the standpoint of Substantive law only.[2]

§ 426. The Due Process Texts, Generally.[3]

The three texts cited may, from the textual point of view, be considered first, separately, and then collectively, as follows:

The Fifth Amendment Text.

(1) The Eminent Domain ("compensation") clause of this text, adds nothing, in legal effect, to the words which

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[1]Legislative and Executive Procedure respectively being classed, in our analysis of our subject, as matter of Substantive Law. See below.

[2]See Preceding note.

As to Due Process of Law in Legislative Procedure as Procedure, see §§ 328-338.

As to Due Process of Law in Executive Procedure, as Procedure, see §§ 308, 309; 312, 313.

As to Due Process of Law in Judicial Procedure as Procedure, see the Second Division of our treatise, Book VII, Chapters XCIII and XCIV (§§ 558-567).

In respect of the question how far the Federal Organic Due Process conception (in looking, for its definition to Substantive law) looks to Federal, and how far to State, law; and how far to Federal Organic, and how far to Federal non-Organic law, see the two succeeding Chap-

precede it, but is a mere particularization, ex industria, thereof: as appears from the fact of presence, in legal effect, with textual absence, of a like compensation clause in the Fourteenth Amendment Due Process text.[4]

(2) The term "property" in the Fifth Amendment text, includes property existing in the form of rights under contract; and is, therefore, of the full breadth in respect of contract-right, of the Impairment clause.[5]

In particular, it covers (as against Federal action) the legal effect of the expression "obligation of," of the Impairment clause, both (a) from the Substantive stand-

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ters, and also particular heads, as: Eminent Domain; Jurisdiction; Federal Question; Following State Decisions.

[3]Fifth Amendment (operative only as against Federal action):—

> No person shall * * *, nor be deprived of life, liberty, or property, without just compensation.

Const., Art. I, § 10:—

> No State shall * * * pass any * * * law impairing the obligation of contracts * * *.

Fourteenth Amendment:—

> * * *, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

As to our characterization and classification of the Impairment clause as a Due Process text, see below in this section: "Impairment Clause", par. (2).

[4]See below, in this section, Fourteenth Amendment (1).

[5]Upon a narrower view, promissory notes, public or corporate bonds, mortgage bonds or notes, and ordinary book credits, and the like, would be omitted from the protection of the Amendment, except in respect of Eminent Domain.

Judicial controversy over questions of public invasion of private rights has, in practice, been confined almost wholly to the field of State action; and there has been very little dealing with the Property clause of the Fifth Amendment,—confined as it is, to Federal action. The doctrine of the text, however, (in respect of Contract right as Property, within the Amendment) has been repeatedly assumed.

Welch v. Cook, 97 U. S. 541; L 24: 1112; in this case, the view presented above was adopted by the Court, although in the particular instance in question the statute relied upon as an (executed) contract was interpreted as a mere bounty statute, and not as creative of a contract.

Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51; S 2: 236; L 27: 648; (assuming, although not in specific terms, that the Courts of the United States, acting in a Legislative way, by Rules, are, by

point,[6] and (b) from the standpoint of right to and in Remedy existing at the making of a contract:[7] since right to, and in, such existing Remedy, is an Incident of all property-right, and is involved in, and thus is an Incident of, the "property" right of the Fifth Amendment.[8]

It covers also, in like manner, (as against Federal action), the legal effect of the term "impairing" of the Impairment clause:[9] that term being not a technical law term, but meaning simply "invading," "interfering with," "depriving of," or the like;[10] and being no broader than the term "deprived of" (property) in the Fifth Amendment.[11]

In fine, all that is (as against State action) in the Impairment clause, is, in legal effect (as against Federal action) in the Fifth Amendment.

(3) The Equal Protection text of the Fourteenth Amendment is present, in legal effect, (as against Federal action) in the Fifth Amendment text.[12]

The Impairment Clause.

We have necessarily considered above, by anticipation, certain features or aspects of the Impairment clause. To what has been thus said, the following is to be added:—

(1) The expression "pass any law" (we may here observe, by anticipation of later text),[13] presents no generic differentiation, in legal effect, of the Impairment clause from the other texts cited: since, while in terms contemplating only action of Legislative character,[14] it, in legal

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the Fifth Amendment, bound not to impair the obligation of contracts).

The same view underlies the whole discussion of the Opinions in the cases dealing with the Legal Tender Act. Hepburn v. Griswold, 8 Wall. 603, 624; L 19:513; Legal Tender Cases, 12 Wall. 457, 550; L 20:287.

[6]Cases cited below. [7]§§ 500-504. [8]Ibid.

[9]§§ 437-443; 458. [10]Ibid. [11]Ibid.

[12]Assumed, as elementary in all cases (first group of cases, § 498; other cases upon the Fifth Amendment, cited in that section).

[13]§ 437.

[14]"Legislative": in the broad sense: see Uses of Terms.

effect, involves, and carries with it, inhibition of State action of any class, Legislative, Executive, or Judicial.[15]

(2) The Impairment clause, while not textually employing the term "due process of law," is, nevertheless, a Due Process text, for the reason that it contains, in legal effect, the qualification: "except by due process of law." Thus, for example, a contract-right existing in the form of franchise, might, notwithstanding the Impairment clause, (and prior to the broadening of that clause by the Fourteenth Amendment),[16] be taken, by State action, by right of State Eminent Domain:[17] (such taking being an impairment, in the proper general sense of that word, but being an impairment by Due Process of Law).

THE FOURTEENTH AMENDMENT TEXT ABOVE CITED.

(1) As has been said above in this section,[18] the "compensation" text of the Fifth Amendment (dealing with Federal action) is (as to State action), present, in legal effect, in the Fourteenth Amendment text cited.[19]

(2) As has been said above in this section,[20] the "equal protection" text of the Fourteenth Amendment is a mere particularization, ex industria, of the immediately preceding "due process" text: as appears from the presence, in

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[15] § 437.

In this respect, the Impairment clause is like the State-cession clause (Art. I, § 8):—

> To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;

which, while dealing, in terms, only with action of Congress, contemplates full Federal Sovereignty, exerciseable by the Federal Executive and Judicial Branches, as well (§§ 69, 70).

[16] See below.

[17] West River Bridge v. Dix, 6 How. 507; L 12: 535; see pp. 531 et seq.; also, Long Island Water Co. v. Brooklyn, 166 U. S. 685; S 17: 718; L 41: 1165.

[18] Under "Fifth Amendment", par. (1).

[19] Cases, generally, of State Eminent Domain, under the Fourteenth Amendment, cited §§ 383-402.

[20] Under "Fifth Amendment", par. (3).

legal effect (although not in letter), of a corresponding text in the Fifth Amendment.[21] That is to say; the qualification: "without due process of law" extends to the "equal protection" clause.[22]

(3) The Fifth Amendment text and the Fourteenth Amendment, both above cited, are, therefore, in their respective spheres, (Federal and State), equivalents, notwithstanding their textual difference.[23]

(4) From this latter consideration—coupled with what has been said above as to the textual and legal relation between the Fifth Amendment text cited and the Impairment clause—it follows: that the Fourteenth Amendment covers all that is in the Impairment clause, and is, in legal effect, duplicative of that clause, to the extent of the original effect of that clause.[24]

POTENTIAL TEXTUAL CONSOLIDATION.

From what has been said above it follows: that the three texts cited above might, without change of legal effect, be consolidated and condensed as follows:

> Neither the United States nor a State shall deprive any person of life, liberty or property, without due process of law.

§ 427. Summary, from the Historical Point of View. What has been said above, from the textual standpoint, may be summarized, and re-stated from the historical point of view as follows:—

(1) The Constitution, in its original form, textually protected Contract right as against State action, but not as against Federal action.[25]

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[21]Ubi supra.

[22]See §§ 497-499, and cases cited.

[23]See Missouri Pac. Ry. v. Humes, 115 U. S. 512, 520; S 6:110; L 29:463; French v. Barber Asphalt Co., 181 U. S. 324, 328 et seq; S 21:625; L 45:879.

[24]That is to say: the Impairment clause should, as matter of logical textual form, have been repealed, in terms (with, ex industria, a saving clause, as to pending matters) by the Fourteenth Amendment.

[25]Impairment clause.

As to the question of operation, to this effect, (as against Federal action), from the taking effect of the Constitution to the Fifth Amendment, of the Declaration of Independence, see §§ 13, 26.

(2) The Fifth Amendment covered (as to Federal action), the whole field covered (as to State action) by the Impairment clause; but went (as to Federal action) farther.

(3) The Fourteenth Amendment moved forward, (as to State action), up to the standard fixed (as to Federal action) by the Fifth Amendment text cited; it covered (as to State action), the whole field, and the precise field, covered (as to Federal action) by the Fifth Amendment text in question; and it thereby covered the field previously covered by the Impairment clause, and thus overlaps that clause, and leaves it (like various other Constitutional texts),[26] a mere textual particularization, of no present independent legal operation,—the Fourteenth Amendment, however (under a familiar principle of Interpretation) taking over to itself existing Judicial Precedent based upon the Impairment text.

Reference, therefore, since the Fourteenth Amendment, to the Impairment clause as operative Constitutional text, speaks merely from the standpoint of usage, and of convenience.

§ 428. Negatory Form.

The Constitutional texts in question might, as matter of textual expression, perfectly well have been put in affirmative, instead of negative (or inhibitory) form. The negatory form is mere matter of textual tradition, passed down from texts prior to, and of, Magna Charta; and is of no legal effect,—the texts being, in substance, affirmative of private rights; and the inhibition of public action being a mere corollary.

§ 429. Particular Terms.

In accordance with a general principle, and pursuant to a general practice of the Common Law, particular terms, of technical or of established usage in the Common Law, are

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[26] As, for example, the "counterfeiting" clause (Art. I, § 8):—

> To provide for the punishment of counterfeiting the securities and current coin of the United States;

which, while historically explainable, is, in legal effect, surplusage, § 94.

So of the greater part, if not the whole, of the State Cession clause, Art. I, § 8 (see our § 69).

employed, in the Constitutional texts in question, in their Common Law sense, and with Common Law definition (expansive or limitative).

This principle applies primarily to the general terms "liberty"; "equal" (protection of the laws); "property"; "contract"; "obligation";[27] but, also, secondarily, to more particular terms, necessarily involved, as: "land"; "chattel"; "easement"; "devise"; "legacy"; "ferry."[28]

The Property, Contract, and Equal Protection features of the texts cited, extend, in a general sense, to corporations.[29]

The Liberty feature of the Fifth and Fourteenth Amendments does not extend to corporations.[30]

§ 430. Elasticity in the Common Law Conception or Definition.

Where, and in so far as, a Common Law conception or definition thus adopted is, at the Common Law, of some degree of elasticity, the Common Law elasticity follows it into the Constitutional texts in question.[31]

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[27]See under those terms, respectively

[28]See under those terms, and other like terms, respectively.

[29]Santa Clara County v. Southern Pac. R. R., 118 U. S. 394; S 6: 1132; L 30: 118; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; S 8: 737; L 31: 650; Knoxville v. Knoxville Water Co., 212 U. S. 1; S 29: 148; L 53: 371 (all dealing specifically with the Fourteenth Amendment, but applicable in principle to the Fifth Amendment).

[30]Northwestern L. Ins. Co. v. Riggs, 203 U. S. 243, 255; S 27: 126; L 51: 168.

[31]See, for illustration, § 446.

CHAPTER LXX.

Public Policy As Definitory of the Due Process Texts In Their Substantive Aspects.[1]

§ 431. The General Principle.

Underlying, and limitatively definitory of, the Due Process texts (such in terms, or such in substance) of the Constitution, is the (Federally Adopted) Common Law conception of Public Policy[2] as limitatively definitory of the private rights affirmed, in general, by those texts: the Common Law conception, as Federally Adopted, being operative distributively, in favor of Federal, and of State, action, up to the full extent of Federal, and of State, power, in general.

(1) In respect of Federal power, we may (in addition to fields of action previously considered),[3] refer for illustration, to the Post Office field;[4] to forbidding of anti-cut-rate contracts, in suprastate commerce;[5] to exclusion of lotteries and the like from suprastate commerce;[6] to the Congressional Pure Food and Drug legislation;[7] to exclusion

[1]"Due Process texts": i. e., texts so characterized in the preceding Chapter (§§ 425-427) including the Impairment clause.

"Substantive aspect": see § 425.

[2]"Policy of Law", "Police Power".

[3]See, in particular, §§ 403-407; see also under particular heads.

[4]Exclusion from the mails of fraudulent and immoral matter (Ex parte Jackson, 96 U. S. 727; L 24:877; Public Clearing House v. Coyne, 194 U. S. 497; S 24:789; L 48:1029).

Punishment for mailing a letter pursuant to a scheme to defraud (Badders v. United States, 240 U. S. 391; S 36:367; L 60:706).

Requirement of designating paid matter in newspapers, etc. as "advertisement" (Lewis Pub'g Co. v. Morgan, 229 U. S. 288; S 33:867; L 57:1190.

[5]Buttfield v. Stranahan, 192 U. S. 470; S 24:349; L 48:525; Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373; S 31:376; L 55:502.

[6]Horner v. United States (No. 2); 143 U. S. 570; S 12:522; L 36:266; Lottery Case, 188 U. S. 321; S 23:321; L 47:492; Francis v. United States, 188 U. S. 375; S 23:334; L 47:508.

[7]See Hipolite Egg Co. v. United States, 220 U. S. 45; S 30:364; L 55:364; Seven Cases v. United States, 239 U. S. 510; S 36:190; L 60:411.

from Foreign commerce even of classes of articles not inherently harmful.[8]

(2) In respect of State power, we need only refer to cases cited at certain other points,[9] and to the numerous cases cited in the succeeding Parts of the present Book,[10] —such cases dealing mainly with the Impairment clause, or with the Due Process Clause of the Fourteenth Amendment, and, in so far, being definitory of the limits of State power in the field now in question.[11]

§ 432. Elasticity of the Common Law Conception.

In its adoption of the Common Law conception and doctrine of Public Policy, the Constitution adopts the feature of elasticity of that conception, and of consequent adaptability of it to political or social conditions as they arise, and as they vary from time to time.[12]

§ 433. Public Policy Power as not Capable of Congressional or of State Renunciation.

Broadly speaking, it is not competent to Congress or to a State to surrender or to renounce, Public Policy power.[13]

§ 434. Congressional Power of Concession to State Public Policy.

An illustration of the elasticity of the Common Law conception of Public Policy is presented in Congressional power of adoption of or concession to, the Public Policy of the several States, subject to revocation by Congress.[14]

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[8]The Abby Dodge, 223 U. S. 166; S 32:310; L 56:390 (sponges grown or gathered under certain conditions).

[9]§ 449; § 471.

[10]Dealing with Liberty, Equal Protection, and Right in Existing Remedy.

[11]See under particular heads in the Index.

[12]Beer Co. v. Massachusetts, 97 U. S. 25; L 24:989; a great number of other like cases, cited throughout the Chapters of the present Book.

[13]Boyd v. Alabama, 94 U. S. 645; L 24:302; Beer Co. v. Massachusetts, cited above; Stone v. Mississippi, 101 U. S. 814; L 25:1079; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746; S 4:652; L 28:585; (all dealing with State action, but pertinent in principle to Congressional action).

[14]As, in respect of manufacture and sale of intoxicating liquors. See Wilson Act; Webb Act. See, also, generally, the succeeding parts of the present Book.

CHAPTER LXXI.

Other Principles, and Various Specific Propositions, Definitory of Due Process.—Method.

§ 435. The Subject Generally.

We have referred above,[1] in a general way, to the Adoption, by the Constitutional Due Process texts,[2] of the Common Law technical sense of the Common Law technical terms employed in those texts, respectively.[3]

We have, further,[4] considered the definitory operation, upon the term "due process of law,"[5] of the (Federally adopted) Common Law conception and doctrine of Public Policy. We desire, at the present point, to direct attention, from the standpoint of Substantive law, (the sole standpoint of the present Book of our treatise) to the definitory operation (upon the term "due process of law") of a great variety of specific heads or doctrines of law, Organic and non-Organic. Illustrative particulars may be presented as follows:—

(1) The definition of Due Process of law includes the highly elaborated body of broader and narrower Common Law conceptions and principles of (a) public right and (b) private right, in the fields of Eminent Domain, of Taxation in general, and of special Taxation (commonly so-called).[6]

(2) It includes the Common Law conception and definition of Equality before the law ("equal protection of the laws"), with potential wide departure (recognized in that conception) from rigid and absolute Equality; that is to say: it embodies the Common Law conception of Equality as admitting, broadly, classifications of persons or of things: with actual Equality only within a particular class.[7]

(3) It includes the Common Law conception and definition of Liberty, with the various important qualifications

[1] § 429. [2] Including the Impairment clause (see § 426).

[3] E. g., "property", "contract", "equal".

[4] In the preceding Chapter.

[5] Expressed, in terms, in the Fifth and the Fourteenth Amendments; understood in the Impairment clause (§ 426).

[6] See Eminent Domain; Taxation.

[7] Part IV, of the present Book (§§ 497 et seq.).

imposed by that conception and definition upon absolute personal liberty.[8]

(4) It includes the Common Law conception of Remedy as matter of inherent and necessary Incident to specific rights: with the numerous Common Law particularizations of the Common Law conception and definition.[9]

(5) It embodies the general conceptions, principles and particulars of the general Law of Nations, as Federally adopted, (not to speak here of Foreign Relations): (a) by the Federal Organic law, for inter-State relations; and (b) by Congress, in exercise of its powers, as among the States and the Federal States as a conventional Community of Nations.[10]

(6) It includes, from the Substantive point of view, a great body of particulars of Federally adopted Common Law (in the broad sense of the latter term).[11]

(7) It includes, potentially, a vast potential range of legislation, Federal or State, consistent with the Constitution of the United States, and definitory, in futuro, of particulars of property right in general, and of contract right, and the like.

§ 436. Method of Treatment.

In the succeeding Parts, respectively, of the present Book, we deal (from the standpoint of definition of Due Process in its Substantive aspect) with the Federal generic conception and definition of Property (including Contract-right); Liberty; Equality before the law (Equal Protection of the Laws); and Remedy (as matter of Substantive right). Various specific heads of law, however, definitory of the Due Process texts, are respectively treated separately, at other points,[12] with proper reference, at the different points, to the Due Process aspect.

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[8]Part III, of the present Book, (§§ 490 et seq.).

[9]"Remedy": not necessarily of Judicial character; and here viewed as matter of Substantive right and apart from particulars of Judicial Procedure. Part V of the present Book, (§§ 500 et seq.).

[10]Book III, (§§ 213 et seq.).

[11]Thus, underlying the question of protection of Contract, there may be, in a particular instance, the question of existence, and of particulars of the contract; and that question may involve any one of a great variety of specific propositions of the Common Law of Contract.

[12]See Taxation; Eminent Domain; Land; Chattels, etc.

CHAPTER LXXII.

Different Aspects of Operation of the Due Process Texts.[1]

§ 437. Operation in the Legislative, Executive and Judicial Fields, Respectively.

1. In the Legislative Field.[2]—In the Legislative field, the operation of the Due Process texts (such in form or such in substance),[3] is direct and simple: Federal or State action violative of the Constitutional Due Process provisions is, as matter of Substantive law, null and void.[4]

In this field, extraneous facts may be inquired into, for ascertainment of the validity.[5]

2. In the Executive Field.—What has been said of the Legislative field, is true, mutatis mutandis, of the Executive field,[6] with this qualification: that where, and in so far as, there is opportunity for objection, in the course of Executive Procedure, such opportunity is to be taken advantage of; and if it is not availed of, the Federal contention is waived.[7]

3. In the Judicial Field.—What has been said of the Legislative and Executive fields, is true of the field of Judicial action, Federal or State, in respect both (a) of invalidity, where invalidity appears upon the face of the record of a particular judgment, Federal or State,[8] and (b) of permissibility of resort to extrinsic evidence to show ab-

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[1]"Due Process Texts": i. e., as defined §§ 425-427,—including the Impairment clause.

[2]The term "legislative" being here used in a broad sense, including the making or Amending of a State Constitution, and action of minor bodies or officials vested with Legislative power. See § 438.

[3]§§ 425-427.

[4]§§ 89-92; cases cited in §§ 342-344.

[5]As, in the case of railroad rates, challenged as confiscatory. (§ 484).

[6]Royall v. Virginia, 116 U. S. 572; S 6:510; L 29:735; Royall v. Virginia, 121 U. S. 102; S 7:826; L 30:883 (both cited and stated in § 89, note).

[7]§ 796. [8]§§ 627; 646, par. (3).

sence of jurisdiction in the strict sense, where such absence of jurisdiction does not appear upon the face of the record.[9]

There is, however, this difference in the Judicial field: that where, in a particular case, the Court in question is not absolutely destitute of jurisdiction, a Federal contention, however fundamental, within the field in question, must (pursuant to general principles of Judicial Procedure), be taken, and pressed, in an orderly way, in the cause; and, if not so taken and pressed, is waived,[10] at least where violation of the Federal Constitutional provision in question does not appear upon the face of the record of the final judgment.

4. Mingling of the Legislative, or of the Executive, With the Judicial Field.—What has been said above of the Legislative, and of the Executive, field, is subject to this qualification: that where invalidity in either of those fields is challenged in a Judicial Proceeding based upon the theory of validity of the action in question, the challenging party may be required (by the existing Federal Procedure law) to make his challenge in a certain manner, and at a certain stage, pendente lite; and failing such challenge, will waive relief in the particular proceeding.[11]

5. "Pass Any Law."—The considerations above cited dispose of any question of specific limitative operation of the textual expressions, "pass any law," and the like.[12]

That is to say,—even if such expressions are to be viewed as primarily contemplating legislation, they embody principles operative upon and in the Executive and Judicial fields. This proposition is illustrated in the great number of cases in which, upon Federal Writ of Error to a State Court, the State Court's judgment has been reversed upon

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[9]Roller v. Holly, 176 U. S. 398; S 20: 410; L 44: 520, in its dealing, collaterally, with the judgment of 1891, (in McClintock v. Proctor) against Roller; numerous cases cited under Faith and Credit (§§ 644-650 and §§ 651, 652), and under Service of Process (§§ 760-762).

[10]See Appeal and Error: (Raising of the Question), and cases cited.

[11]See, for illustration, Error to State Court: Raising of Federal Question (§ 807).

[12]No State shall * * * pass any law * * *.
No * * * law * * * shall be passed.

the ground of its failure to recognize private rights guaranteed by one or another of the Due Process Texts.[13]

§ 438. Higher and Lower Planes of Action.

The Federal Inhibitions or limitations, in general, address themselves to no particular plane of public action. Thus, in the Federal Legislative field, they address themselves to every plane from Congress down, and in the State Legislative field, from the making or amending of State Constitutions,[14] down (at the other extreme) to the plane of municipal corporations, and lesser officiel, generally.[15]

So of Executive action,[16] and of Judicial action.[17]

§ 439. Successive Stages of Violation.

It is, from the standpoint of Federal inhibition against public action (Federal or State), immaterial whether particular action in question is, or is not, based upon preceding violative action. Thus, an ordinance of a State municipal corporation is none the less within the Federal inhibition, by reason of the fact of being consistent with, and based upon, a State statute, itself violative of the Federal inhibition in question.[18]

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[13]See § 427.

[14]Louisville & Nashv. R. R. v. Central Stock Yards Co., 212 U. S. 132; S 29:246; L 53:441.

[15]St. Louis v. Western Un. Tel. Co., 148 U. S. 92; 149 U. S. 465; S 13:485; L 37:380; S 13:990; L 37:810; Walla Walla v. Walla Walla Water Co., 172 U. S. 1; S 19:77; L 43:401; Detroit v. Detroit Street Ry., 184 U. S. 368; S 22:410; L 46:592; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65; S 22:585; L 46:808; Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207; S 23:498; L 47:778; Pacific Elec. Ry. v. Los Angeles, 194 U. S. 112; S 24: 586; L 48:896; Cleveland v. Cleveland City Ry., 194 U. S. 517; S 24:756; L 48:1102; Blair v. Chicago, 201 U. S. 400; S 26:427; L 50:801; Mercantile Trust Co. v. Columbus, 203 U. S. 311; S 27:83; L 51:198; Raymond v. Chicago Traction Co., 207 U. S. 20; S 28:7; L 52:78; Northern Pac. Ry. v. Duluth, 208 U. S. 583; S 28:341; L 52:630; Londoner v. Denver, 210 U. S. 373; S 28:708; L 52:1103; North American Storage Co. v. Chicago, 211 U. S. 306; S 29:101; L 53:195; Grand Trunk Western Ry. v. South Bend, 227 U. S. 544; S 33:303; L 57:633; Cuyahoga Power Co. v. Akron, 240 U. S. 462; S 36:402; L 60:743.

[16]See § 437, (2) and cases cited.

[17]See Error to State Court (Class of State Court), (§ 801).

[18]Mercantile Trust Co. v. Columbus, 203 U. S. 311; S 27:83; L 51:198.

So, of State Judicial action based upon, and in harmony with colorably existing State legal text, itself void by reason of violation of a Federal inhibition upon public action.[19]

So, of a State Constitution, based upon (in respect of one certain provision of its text) and harmonious with, an Enabling Act (of Congress), itself violative of a Federal Constitutional provision.[20]

§ 440. Action of Lower Plane in Conflict with Law of Higher Plane.

Action of lower plane may be within the scope of limitative Federal Constitutional provision none the less because violative of, or unsupported by, law of higher plane of the same jurisdiction.[21]

§ 441. Action as Within, or as Not Within, a General Field of Duty.

We may assume that, (by analogy with a familiar principle of the Common Law of Agency), action of a public official, of any character or of any plane, to be within the scope of Federal limitation or inhibition upon public action, must have been in the course of a general duty of such official: otherwise it is mere private action.[22]

§ 442. Coincidence of Federal and of State Inhibition.

It is immaterial, (for the purposes of the Federal law now in question), that a particular Federal Constitutional

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[19]Chicago, B. & Q. R. R. v. Chicago, 166 U. S. 226; S 17:581; L 41:979.

[20]Gunn v. Barry, 15 Wall. 610; L 21:212.

[21]Thus, in Virginia v. Rives, 100 U. S. 313; L 25:667; Ex parte Virginia, 100 U. S. 339; L 25:676; Neal v. Delaware, 103 U. S. 370; L 26:567 (all cited in § 437), the State action (of lower plane) in question, was either in conflict with the State law, or had no support in colorable State law.

So, Scott v. McNeal, 154 U. S. 34; S 14:1108; L 38:896; Thomas v. Texas, 212 U. S. 278; S 29:393; L 53:512; Southern Pac. Co. v. Interstate Com. Comm., 219 U. S. 433; S 31:279; L 55:310; Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278; S 33:312; L 57:510.

So, in the Federal field. Weeks v. United States, 232 U. S. 383; S 34:341; L 58:652-3. (Fourth Amendment.)

[22]Hughes v. United States, 230 U. S. 24; S 33:1019; L 57:1374, while not strictly to this point, is illustrative.

text in question is textually duplicated by a text of a State Constitution.[23]

§ 443. Definition of Violative Action.

Action violative of Federal limitation or inhibition upon public action may be illustratively defined as follows:

(1) Mere failure, on the part of a political society, of higher or of lower plane, to comply with the terms of a contract (to which such political society is a party) is not violative of the Impairment Clause or of the Due Process Clause of the Fourteenth Amendment;[24] nor mere expression—even in Legislative form—of an opinion adverse to private rights;[25] nor a mere determination, Legislative in form, to bring suit (even in a State Court) to challenge and to test a claim of private right.[26]

(2) Actual or proposed Judicial Procedure, however, aimed not merely at a just ultimate judgment, but so framed or contemplated as practically to exclude private individuals from Judicial resort, is, pro tanto, not Judicial Procedure, but duress; and, as such, is violative of a Federal limitation or inhibition in question.[27]

(3) So of action primarily Legislative in form, but going beyond mere expression of a view, and, in form, directly

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[23]Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278; S 33:312; L 57:510. (As to form of presenting a Federal contention, in such situation, see Error to State Court).

[24]St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142; S 21:575; L 45:788; Dawson v. Columbia Trust Co., 197 U. S. 178; S 25:420; L 49:713; McCormick v. Oklahoma City, 236 U. S. 657; S 35:455; L 59:771.

[25]St. Paul Gas Light Co. v. St. Paul; Dawson v. Columbia Trust Co., both cited above; Northern Pac. Ry. v. Duluth, 208 U. S. 583, 590; S 28:341; L 52:630.

[26]Defiance Water Co. v. Defiance, 191 U. S. 184; S 24:63; L 48:140. In this case, a municipal corporation of a State, brought suit in a State Court, seeking a judgment of invalidity of a contract with a water company, and obtained injunction. In this situation, it was not competent to the water company to maintain a counter-suit, in a Federal Court (on the ground of Federal question, relying on the State Court suit as action of Impairment). In such situation, there was a complete Federal remedy, in the State suit, in respect of questions of Federal law arising; and a presumption of justice, in respect of non-Federal questions of law, and of questions of fact. So, Des Moines v. City Ry., 214 U. S. 179; S 29:553; L 53:958.

[27]See Due Process in Judicial Procedure (§§ 558 et seq.).

operative, proprio vigore, to establish rights or absence of rights, even though no direct physical enforcement is provided for: as, in the case of an ordinance of a State municipal corporation, repealatory, in form, of a railroad street franchise;[28] or in terms making an actual reduction of street-railway fares;[29] or in terms fixing upon a railroad corporation the duty of a certain reconstruction of its roadway;[30] or denying liability under a certain water contract, and providing for (and followed by) a municipal election for issue of municipal bonds for establishment of a rival water plant.[31]

So of an order—on its face self-executory—of a railroad commission, fixing rates.[32]

So of proceeding to build a dam, without legal procedure, in violation of water-power rights.[33]

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[28]Grand Trunk Western Ry. v. South Bend, 227 U. S. 544; S 33: 303; L 57: 633.

[29]Cleveland v. Cleveland City Ry., 194 U. S. 517; S 24: 756; L 48: 1102.

[30]Northern Pac. Ry. v. Duluth, cited above.

[31]Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65; S 22: 585; L 46: 808.

See also Blair v. Chicago, 201 U. S. 400; S 26: 427; L 50: 801.

[32]McChord v. Louisville & Nashv. R. R., 183 U. S. 483; S 22: 165; L 46: 289.

[33]Cuyahoga Power Co. v. Akron, 240 U. S. 462; S 36: 402; L 60: 743.

As to mere breach of contract, see § 458.

PART II.

THE FEDERAL CONCEPTION AND DEFINITION OF PROPERTY (AS RES, OR AS TITLE);—CONTRACT-RIGHT AS PROPERTY;—FRANCHISE AS PROPERTY.

CHAPTER LXXIII.

Certain General Principles of Property (Including Contract Right and Franchise Right).[1]

§ 444. Scope of the Conception of Property:—(a) Contract-Right as Property.

We have pointed out above,[2] that the Fifth Amendment, in it "property" text, covers, (as against Federal action), the whole Contract field covered (as against State action) by the Impairment clause.

At the present point, we treat right existing under Contract as merely one form of property.[3]

§ 445. Scope of the Conception of Property:—(b) Franchise as Property: Franchise as Contract.

A franchise arises by public grant, express or implied; and a public grant, like a private grant or conveyance, is a contract: an executed contract.

Viewed from the standpoint of the title vested in the franchise-holder, a franchise is property; viewed from the standpoint or origin and mode of creation and of acquisition, a franchise is (executed) contract. The situation is the same, in fine, that exists in case of an ordinary conveyance of land: the grantee's title is property, simply; but from the standpoint of origin and mode of acquirement, the situation is one of (executed) contract.

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[1] Limitation upon Federal Action.

Fifth Amendment:—

> No person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use without just compensation.

Limitation upon State Action:—

Const., Art. I, § 10:—

> No State shall * * * pass any * * * law impairing the obligation of contracts * * *.

Fourteenth Amendment:—

> * * * nor shall any State deprive any person of * * * property, without due process of law; * * *

[2] §§ 426, 427.

[3] As to features peculiar to property existing in the form of right under Contract, see §§ 458-466.

At the Common Law, franchises were commonly viewed from the standpoint, not of (executed) contract but of property; the franchise, in the abstract, being viewed as an incorporeal property-res, and the holder's interest as property-title. This view has continued, and has prevailed, in the Federal Organic law, when and in so far as potential scope of Federal action has been in question.

That is to say, the Property clauses of the Fifth Amendment have been viewed as inclusive of franchises as "property."

In respect, however, of State action, the original Constitution gave Federal recognition in terms, not to "property," in general, but only to property existing in the form of right to the obligation of contracts.[4] The result was: that a franchise, to be brought within the protection of the Federal Organic law, had to be viewed: not from the standpoint of title, but from the standpoint of origin: that is to say, of (executed) contract.

This point of view, when first presented and applied,[5] was a novel one; and it may be said to have appeared to many persons a forced conception.[6]

In view of the Property clause of the Fourteenth Amendment, it is unnecessary now to resort to the contract aspect of franchise title for Federal protection as against State action.

For definition and particulars of a given franchise, the grant is, of course, always to be looked to.

While the contract aspect in franchises has thus been emphasized (from the standpoint of protection as against State action), the property aspect has been equally observed. Thus, a State-granted franchise is property, for purposes of State taxation.[7]

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[4]Impairment clause.

[5]Trustees of Dartmouth College v. Woodward, 4 Wh. 518; L 4: 629.

[6]We may refer to the extreme elaborateness of the different Opinions rendered in the case in support of the proposition that the charter in question was a contract; to the very considerable body of controversial literature dealing with the Dartmouth College case, down to a recent period; to the repeated challenge of the decision, in argument, (see Federal decisions in which the case has been cited), and to the continued Judicial recognition of need of explanation and of justification of the decision (cases above referred to).

[7]Metropolitan Ry. v. New York, 199 U. S. 1; S 25: 705; L 50: 65.

§ 446. Potential Differences in Local Particulars.

Within the degree of elasticity known to the Common Law, in respect of particulars of property-title, the Federal Organic law of Property leaves to the Legislative and to the Judicial authorities, respectively, of the States severally, power of particulars of definition of Property; and confines itself to the definition and to the guarding of those limits.

The principle applies alike (a) to property-res existing by nature; (b) to property-res created by private human effort; and (c) to property-res created by law (as, a Patent or Copyright franchise).

The breadth of State power of definition of property-res is illustrated in State capacity to protect wild birds, in flight through, and within, a State, as property-res.[8]

The outer limit, on the other hand, of State power in this field, is defined and illustrated by and in State incapacity of giving to minerals, when extracted and separated from the soil, a characterization other than that of chattels in general.[9]

§ 447. The Question of Public Office as Property:—(a) As Between the Public and the Office-holder.

1. Federal Office.—As between the Federal public generally, or a particular Federal public (the public of a Federal area), Federal public office is—as matter of Unwritten Federal Organic law (Organic Public Policy)—not capable of being viewed as private property.[10]

2. State Office.—The existence of the principle above stated (dealing with Federal office) does not, in and of itself, necessarily involve the conclusion of incapacity on the

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[8]Geer v. Connecticut, 161 U. S. 519; 316:600; L 40:793; see Patsone v. Pennsylvania, 232 U. S. 138; S 34:281; L 58:539; Sentell v. New Orleans etc. R. R., 166 U. S. 698; S 17:693; L 41:1169.

[9]Oklahoma v. Kansas Nat. Gas Co., 221 U. S. 229; S 31:564; L 55:716, and (as Haskell v. Kansas Natural Gas Co.), 224 U. S. 217; S 32:442; L 56:738.

As to a seat in a stock exchange as property, definable by the terms of membership, see Hyde v. Woods, 94 U. S. 523; L 24:264; Page v. Edmunds, 187 U. S. 596; S 23:200; L 47:318.

[10]Sanchez v. United States, 216 U. S. 167; S 30:367; L 54:432. See Blake v. United States, 103 U. S. 227; L 26:462; Crenshaw v. United States, 134 U. S. 99, 104; S 10:431; L 33:825.

part of a State to give to State public offices—of lower, if not of higher, plane—the character, as against the State, of private property, within the Federal Organic conception of property. The natural conclusion, however, would seem to be that the Federal Organic policy (above referred to), applicable to Federal office, is applicable to State office, from the point of view of Federal Organic law.[11]

§ 448. The Question of Public Office as Property:—(b) As Between Private Claimants.

As between rival claimants of an office carrying emoluments, public office has, by reason of such emoluments, a property aspect, and is, thereby, "property" within the view of the Federal Organic law.[12]

§ 449. Distinction Between (a) Property-Res and (b) Right of a Particular Use Thereof.

The distinction is fundamental between (a) title to a particular property-res, and (b) right to a particular use thereof.[13]

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[11]See Butler v. Pennsylvania, 10 How. 402, 416; L 13:472; Taylor v. Beckham (No. 1), 178 U. S. 548, 576, 577; S 20:890; L 44:1187.

[12]Kennard v. Louisiana, 92 U. S. 480; L 23:478; in which the jurisdiction of the Supreme Court would seem to have been capable of being rested solely on the Property clause of the Fourteenth Amendment.

[13]Thus, a State inhibition (otherwise lawful) of making brick within a certain portion of the city, is not a deprivation of property of the owner of a clay-bed there situated. Hadacheck v. Los Angeles, 239 U. S. 394; S 36:143; L 60:348.

So, of emission of dense smoke by a manufacturing plant in a city. Northwestern Laundry v. Des Moines, 239 U. S. 486; S 36:206; L 60:396.

So, Ohio Oil Co. v. Indiana (No. 1), 177 U. S. 190; S 20:576; L 44:729 (regulation of drawing of natural gas); Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61; S 31:337; L 55:369 (regulation of drawing of mineral spring water); L'Hote v. New Orleans, 177 U. S. 587; S 20:788; L 44:899 ("segregated district" in city); House v. Mayes, 219 U. S. 270; S 31:234; L 55:213 (regulation of sales by grain exchange); Central Lumber Co. v. South Dakota, 226 U. S. 157; S 33:66; L 57:164 (inhibition of low-price sales aimed at destroying competition); Rail Coal Co. v. Ohio Industrial Comm., 236 U. S. 338; S 35:359; L 59:607 (requirement of coal-screening, at mine); Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531; S 34:359; L 58:713 (requirement of leaving pillars in coal-mines); Wurts v. Hoagland, 114 U. S. 606; S 5:1086; L 29:229 (enforced drainage of private lands; see also under Special Taxes); Grenada Lumber Co. v. Mississ-

We may here refer to the familiar Common Law doctrine that the owner of property may, by his voluntary action, subject it to rights of the public therein, and, thereby, to public regulation.[14]

In fine, there is no such thing as absolute and exhaustive private right of property; but all property is subject to certain rights of the public.

§ 450. Expectancies of Public Gratuity, not Property.

Mere expectancies of a public gratuity are not property, however well founded may be the expectation.[15]

§ 451. Bounty Laws, Not Acted Upon.

An offer, in futuro, of a public bounty for action conceived to be of public advantage is—like an offer by a private person—revocable prior to acceptance by action under it,[16] and is, therefore, at that stage, not the subject of private property title.[17] When it is accepted, by action under it while it still stands open, a contract arises—as would be the case between private persons—and the acceptor's interest therein is a property-right.[18]

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ippi, 217 U. S. 433; S 30:535; L 54:826 (anti-monopoly etc. legislation); German Alliance Ins. Co. v. Hale, 219 U. S. 307; S 31:246; L 55:229 (inhibition of Insurance combinations); Price v. Illinois, 238 U. S. 446; S 35:892; L 59:1400 (inhibition of boric acid in food products); Halter v. Nebraska, 205 U. S. 34; S 27:419; L 51:696 (inhibition of United States flag upon merchandise, as advertisement).

[14]Munn v. Illinois, 94 U. S. 113; L 24:77; Budd v. New York, 143 U. S. 517; S 12:468; L 36:247 (cases of State regulation of privately owned grain elevators).

[15]Such an expectancy is, for example, not assets for creditors. Emerson's Heirs v. Hall, 13 Pet. 409; L 10:223; Briggs v. Walker, 171 U. S. 466; S 19:1; L 43:243; Blagge v. Balch, 162 U. S. 439; S 16:853; L 40:1032.

[16]Salt Co. v. East Saginaw, 13 Wall. 373; L 20:611; Tucker v. Ferguson, 22 Wall. 527; L 22:805; West Wisconsin R. R. v. Supervisors, 93 U. S. 595; L 23:814; Welch v. Cook, 97 U. S. 541; L 24:1112.

[17]Cases last cited.

So of a State statutory offer of sale of public land (Banning Co. v. California, 240 U. S. 142; S 36:338; L 60:569.

[18]Burdon Sugar Co. v. Payne, 167 U. S. 127; S 17:754; L 42:105. (In this case, an Act of Congress offered a bounty to manufacturers of sugar from cane grown within the United States. The manufacturer

§ 452. Assets, Generally, as Property.

The Federal Constitutional protection of property is not limited to specific articles, but extends to an individual's assets as a fund, without regard to the specific articles, corporeal or incorporeal, of which the fund is composed; and protects against undue reduction of such fund, as it protects against unlawful dealing with a specific piece of property-res.

This appears from the principle (viewed from the standpoint of Substantive law) that a fixing of rates, or other requirement involving expense or loss of revenue, or a penalty provision, may be a deprivation or diminution of property within the Fifth and Fourteenth Amendments.[19]

§ 453. Right of Freedom from, (or Limits of), Penalties, Damages, and the Like.

A feature of a private individual's property-right in his assets, as a fund, is his right, as matter of property (1) to freedom, to a certain extent, from, and (2) to certain limitations of, penalties, damages, and other burdens: as, in unreasonably low rates;[20] unreasonable requirement of furnishing freight cars;[21] building switches, sidings, and the like;[22] providing scales at railroad stations;[23] provision for double damages, for failure to pay a claim;[24] and, a fortiori, penalizing refusal to pay excessive charges.[25]

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could pledge, in advance, his expected bounty, in favor of a cane-grower, to secure the price of cane).

As to certain instances of Treaty claims, see Comegys v. Vasse, 1 Pet. 193; L 7:108; United States v. Weld, 127 U. S. 51; S 8:1000; L 32:62; Williams v. Heard, 140 U. S. 529; S 11:885; L 35:550.

[19]Chicago, Milw. & St. Paul R. R. v. Wisconsin, 238 U. S. 491; S 35:869; L 59:1423 (non-lowering of unoccupied upper berth); Loan Ass'n v. Topeka, 20 Wall. 655, 659 et seq.; L 22:455. See Rates, § 484.

[20]Ex parte Young, 209 U. S. 123; S 28:441; L 52:714.

[21]Louisville & Nashv. R. R. v. Central Stock Yards Co., 212 U. S. 132; S 29:246; L 53:441.

[22]Missouri Pac. Ry. v. Nebraska, 217 U. S. 196; S 30:461; L 54:727.

[23]Great Northern Ry. v. Minnesota, 238 U. S. 340; S 35:753; L 59:1337.

[24]Chicago, Milw. & St. P. Ry. v. Polt, 232 U. S. 165; S 34:301; L 58:554.

[25]St. Louis, Iron Min. etc. Ry. v. Wynne, 224 U. S. 354; S 32:493; L 56:799.

§ 454. Right of or to Transfer.

1. Inter Vivos.—The Federal Organic definition of private property-right includes right of transfer inter vivos. Thus, it is not competent to a State to forbid, even to domestic banking corporations, sale and endorsement of notes held at the time by such corporations,[26] or to place burdens of prohibitive tendency upon transfer.[27]

The right of transfer is, of course, subject to such definitory qualifications as apply to property-right generally: as, a requirement of recording,[28] or of notice to persons interested;[29] or a requirement that in a sale, a note, given in payment, shall state the nature of the consideration;[30] or change in method of transfer of shares of stock in domestic corporations: with requirement of public record;[31] or requirements of mode of sale, aimed at protection of buyers from deception.[32]

2. Testamentary Power.—At the Common Law, testamentary power was not viewed as a natural right; and, in so far as it existed, at a given time, it was a mere creature of statute, and a privilege voluntarily granted by the public, as a matter of Public Policy. This view enters, as matter of definition, into the Federal Organic conception of Property; and, as far as the Federal Organic law is concerned, Congress, within the sphere of Federal action, and the States severally, within their several spheres, are free to deal with the matter at pleasure. In no jurisdiction is affirmative law, adverse to testamentary power, needed, to make such power non-existent; the mere absence of Written law of the subject would involve absence of power; for

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[26]Planters' Bank v. Sharp, 6 How. 301; L 12:447.

[27]Walker v. Whitehead, 16 Wall. 314; L 21:357; Cuthbert v. Virginia, 135 U. S. 662; S 10:972; L 34:304.

[28]United States v. Crosby, 7 Cr. 115; L 3:287; Allen v. Riley, 203 U. S. 347; S 27:95; L 51:216.

[29]Curtis v. Whitney, 13 Wall. 68; L 20:513.

[30]John Woods & Sons v. Carl, 203 U. S. 358; S 27:99; L 51:219; Ozan Lumber Co. v. Union County Bank, 207 U. S. 251; S 28, 89; L 52:195 (State statutory requirement of statement of the consideration, where the consideration is a patent right).

[31]Henley v. Myers, 215 U. S. 373; S 30:148; L 54:240.

[32]Armour & Co. v. North Dakota, 240 U. S. 510; S 36:440; L 60:771; (State requirement of certain fixed net weights of lard sold at retail in containers).

it is only in and by, and only as fixed and defined by, Written law, that it exists in any jurisdiction.[33]

3. By Intestacy Succession.—The question of right of transfer of property, in case of intestacy, may be considered from two separate standpoints: that of the decedent, in his lifetime, and that of survivors.

That is to say, there may be asserted, on the one hand, the view that a living person has, as matter of Federal Organic law, a property-right to the effect that in case of, and to the extent of, intestacy, his property shall pass to persons within a certain limited class; and there may be independently asserted the view: that upon death, and in case of intestacy, there at once arises, (as matter of Federal Organic Law), in persons within a certain limited class, title in property late of the decedent.

The two theories would come to the same thing in practice; and they may be considered together.

In view of practice, in England and in this country, for centuries, it could not be claimed that such class, and the property-rights of such persons, inter se, are fixed and defined by natural right. The concession would have to be made: that the class and the relations of its members, inter se, are, to a large extent, matter of discretion with the public. The claim of right would necessarily take the form of a contention that upon the decease of a property-owner, the public becomes a trustee of the property, with the obligation of distributing it, in its discretion, among a class composed of blood relations, or a surviving husband or wife. There is no support, in Federal authority, for such a contention.

4. By Deed of Trust, Operative upon Death.—What has been said above (particularly in respect of testamentary disposal) is applicable to disposal by deed or by other form of transfer inter vivos, anticipatory of the testator's

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[33]United States v. Perkins, 163 U. S. 625; S 16:1073; L 41:287; Magoun v. Illinois Trust etc. Bank, 170 U. S. 283; S 18:594; L 42:1037; Knowlton v. Moore, 178 U. S. 41; S 20:747; L 44:969; Cahen v. Brewster, 203 U. S. 543; S 27:174; L 51:310; Uterhart v. United States, 240 U. S. 598; S 36:417; L 60:819.

decease; revocable by him (but actually not revoked) in his lifetime.[34]

§ 455. De Minimis.

In all fields, the Common Law principle De Minimis, is recognized and applied. Thus—in the field of Property—articles intended for sale as food, but unwholesome, and by law non-saleable, may—as far as Federal Organic law is concerned—be treated as non-property, (that is, of no property value), and destroyed, without notice, and without compensation, even where they have some small pecuniary value for purposes other than food.[35]

So a foreign corporation, lawfully ordered, in a State proceeding, to produce its books and papers from outside the forum, is not entitled, as a condition of compliance, to compensation for its effort and expense therein—the diminution thereby of its property (its general assets) being viewed as negligible.[36]

§ 456. Title of Abuttor in the Soil of a Public Way.

Land within the locus of a public way, intrastate or extrastate, does not, from the standpoint of Federal Organic Property law, differ generically from other land, in general, in respect of title thereto or therein; and the only questions, in the case of any given way, or of any given areal portion of any given way, are: (a) who has the general title in the soil; and (b) who has easements therein. It is, for example, competent to the public, in creating a public way, to condemn the fee, and to become the sole and exclusive owner of the whole title: with no right in abuttors, as such, but with the right only of entering and travelling on the way, as members of the general public. It is, however, equally competent to the public, in creating a way, to leave in, or to grant to, abuttors, as such, peculiar

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[34]Bullen v. Wisconsin, 240 U. S. 625; S 36:473; L 60:830 (valid State succession tax in such situation).

[35]Reduction Co. v. Sanitary Works, 199 U. S. 306; S 26:100; L 50:204; Gardner v. Michigan, 199 U. S. 325; S 26:106; L 50:212; North American Storage Co. v. Chicago, 211 U. S. 306; S 29:101; L 53:195.

See also, Lawton v. Steele, 152 U. S. 133; S 14:499; L 38:385 (destruction of fishing-nets unlawfully set).

[36]Consolidated Rendering Co. v. Vermont, 207 U. S. 541; S 28:178; L 52:327.

title in the way: as, an easement of light, or of a certain grade. All this is matter of option with a given public, Federal or State, in creating any given public way.

What the public can do, in the creation of a way, it can, of course, do subsequently, by granting such peculiar easements to abuttors on a given way, or class of ways, or in public ways in general.[37]

In such original or subsequent action, the concession or grant may be of any desired degree of breadth or narrowness, at the public pleasure. Thus, there may be left in (or granted to) abuttors, an easement of right of continuance of a certain grade,[38] or of light and air.[39] In fine, the question is one of mere local land-title, and involves no Federal element except that of Federal assurance of such property (title) rights as exist by the local law.[40]

§ 457. The Question of Private Property in Existing Law Other than Law of Remedy.[41]

The question has from time to time arisen, in different forms, whether, under any circumstances, (and, if at all, under what circumstances, and how far), private individuals have a property-right in existing law other than law of Remedy,[42] that is, a right to continuance, without change, of such existing law.

The Federal law of the subject may, perhaps, be summarized as follows:—

(1) In existing law, merely as such, there is no such

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[37]Ettor v. Tacoma, 228 U. S. 148; S 33:428; L 57:773.

[38]Ettor v. Tacoma, cited above.

[39]Muhlker v. Harlem R. R., 197 U. S. 544; S 25:522; L 49:872 (four Justices dissenting); Birrell v. New York & Harlem R. R., 198 U. S. 390; S 25:667; L 49:1096.

[40]See Transportation Co. v. Chicago, 99 U. S. 635; L 25:336; Pennsylvania R. R. v. Miller, 132 U. S. 75; S 10:34; L 33:267; New York Elev. R. R. v. Fifth Bank, 135 U. S. 432; S 7:23; L 30:259; Hot Springs R. R. v. Williamson, 136 U. S. 121; S 10:955; L 34:355; Osborne v. Missouri Pac. Ry., 147 U. S. 248; S 13:299; L 37:155; Meyer v. Richmond, 172 U. S. 82; S 19:106; L 43:374; Sauer v. New York, 206 U. S. 536; S 27:686; L 51:1176. (The distinction is, of course, always to be observed, between (a) Federal cases arising in the Federal Original Jurisdiction, applying State law, and (b) cases of Federal Error to a State Court.)

[41]As to Law of Remedy, see §§ 500-506.

[42]As to which, see note above.

private property-right. Thus, the question of particulars of disposition of the property of decedents is, in the view of the Federal Organic law, matter of Public Policy of any given jurisdiction; and during the life of a property-owner there exists, in other persons, no property-right, in existing law, providing for succession.[43]

So of existing law of Eminent Domain Procedure,[44] and of an administrator's statutory power of sale of property.[45]

So, existing holders of tax certificates may, by new legislation, be required to notify the owner of land before taking a tax deed.[46]

So, of a requirement of public record of transfer of corporate stock, as a condition of freedom from shareholder's liability.[47]

So, in the view of the Federal Organic law, the field of definition of private tort, and of dealing with such torts, and with penalties payable to private individuals, is a field of Public Policy (of the United States, of the States severally, and of Federal areas severally to the extent of their general delegation of power); and may be dealt with fully in such field; with the result—to speak from the standpoint of the Federal Organic law of Property—that a private individual has no property-right in this field. This is true broadly, and in respect of all stages up to and exclusive of the stage of actual receipt of compensation.[48]

This principle is applicable, a fortiori, to change in existing law of tort, in futuro.[49]

What has been said above of torts, is applicable to the

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[43]Baker's Ex'ors v. Kilgore, 145 U. S. 487; S 12:943; L 36:786; validity, as against a husband and his existing judgment creditors, of a State statute abolishing, in praesenti, the husband's expectancy (up to that time existing) in future products of the wife's lands. See Arnett v. Reade, 220 U. S. 311; S 31:425; L 55:477.

[44]Backus v. Fort Street Union Depot Co., 169 U. S. 557; S 18:445; L 42:853.

[45]Bank of Hamilton v. Dudley's Lessee, 2 Pet. 492; L 7:496.

[46]Curtis v. Whitney, 13 Wall. 68: L 20:513.

[47]Henley v. Myers, 215 U. S. 373; S 30:148; L 54:240.

[48]Louisiana v. New Orleans, 109 U. S. 285; S 3:211; L 27:936.

[49]Missouri Pac. Ry. v. Mackey, 127 U. S. 205; S 8:1161; L 32:107; Martin v. Pittsburg etc. R. R., 203 U. S. 284; S 27:100; L 51:184; Missouri Pac. Ry. v. Castle, 224 U. S. 541; S 32:606; L 56:875.

interest of possible or of actual informers in qui tam actions.[50]

Where a class of persons peculiarly in need of protection in respect of their property-rights are, for their protection, subjected by law to disability in respect of disposal of property, the disability is mere matter of Public Policy of the time being, and is subject to change, and is not, in favor of such persons, a feature of property-right.[51]

(2) Law, Written or Unwritten, of limitative character, existing at a particular period, enters, by way of limitation, into a contract then made, a franchise then granted, or other property-right then newly arising; qualifies its particular terms; and, pro tanto, takes it out of the definition of contract, or of property, within the Constitutional texts in question.[52]

(3) It is immaterial that such existing limitative law rests at the time in question, in future Judicial decision. In such situation, the contract-right, franchise, or other property-right, is subject to subsequent such Judicial decision.[53]

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[50]Norris v. Crocker, 13 How. 429; L 14:210; Confiscation Cases, 7 Wall. 454; L 19:196.

[51]As, in the case of Federal inhibition of alienation, by Indians, of lands individually held. Williams v. Johnson, 239 U. S. 414; S 36:150; L 60:358.

See also, Due Process of Law in Legislative Procedure; and Public Policy; and cases cited.

[52]Mason v. Haile, 12 Wh. 370; L 6:660; Railroad v. McClure, 10 Wall. 511; L 19:997; German Bank v. Franklin County, 128 U. S. 526; S 9:159; L 32:519; Denny v. Bennett, 128 U. S. 489; S 9:134; L 32:491; Gulf & Ship Island R. R. v. Hewes, 183 U. S. 66; S 22:26; L 46:86; Peters v. Broward, 222 U. S. 483; S 32:122; L 56:278; Consumers' Co. v. Hatch, 224 U. S. 148; S 32:465; L 56:708; Ennis Water Works v. Ennis, 233 U. S. 652; S 34:767; L 58:1139.

In Mason v. Haile, cited above, a prison bond, "until lawfully discharged", incorporated and was subject not merely to (State) Judicial discharge, but to discharge by (State) Legislative Resolve, the latter form of discharge being consistent with existing Organic law of the State.

[53]Miller v. Ammon, 145 U. S. 421; S 12:884; L 36:759; Railroad v. McClure, cited above; Central Land Co. v. Laidley, 159 U. S. 103; S 16:80; L 40:91; National Mut. Bldg. & Loan Assoc. v. Brahan, 193 U. S. 635; S 24:532; L 48:823; Moore-Mansfield Co. v. Electrical Co., 234 U. S. 619; S 34:941; L 58:1503; Cleveland & Pittsburgh R. R. v. Cleveland, 235 U. S. 50; S 35:21; L 59:127.

(4) Existing Written law, (considered solely as such, apart from any question of existing Judicial interpretation of it), affirmatively and specifically permissive of the coming into existence of a contract-right, a franchise, or other property-right, enters into such contract, franchise, or other right; is protected by the Federal Constitutional texts in question; and is irrepealable.[54]

(5) This principle appears (a) to be operative in like manner on pure Unwritten law (existing in the form of authoritative Judicial Precedent of the forum in question), and to make such Precedent incapable of reversal or modification adversely to such rights arising prior to reversal or modification;[55] and (b) to be so operative also upon existing Judicial Precedent interpretative of Written law.[56]

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[54]Steamship Co. v. Joliffe, 2 Wall. 450; L 17:805.

[55]Douglass v. Pike County, 101 U. S. 677; L 25:968; Green County v. Conness, 109 U. S. 104; S 3:69; L 27:872; Muhlker v. Harlem R. R., 197 U. S. 544; S 25:522; L 49:872; (see dissenting Opinion); Birrell v. New York & Harlem R. R., 198 U. S. 390; S 25:667; L 48:1096; (four Justices dissenting). See, however, Sauer v. New York, 206 U. S. 536; S 27:686; L 51:1176.

[56]State Bank v. Knoop, 16 How. 369; L 14:977; Jefferson Branch Bank v. Skelly, 1 Black 436; L 17:173.

The cases cited above in the present section are cases of Federal Appellate Review of State Judicial decision.

Cases arising in the Federal Original Jurisdiction, and not presenting on the record the Constitutional questions now under discussion, may, perhaps, properly be cited here, as in some degree corroborative of propositions tentatively stated above in the present section. In these cases (about to be cited) the Federal Judiciary recognizes and applies (as matter of general law) the principles which we have tentatively stated above as and for doctrines of Constitutional law. Gelpcke v. Dubuque, 1 Wall. 175; L 17:520; Havemeyer v. Iowa County, 3 Wall. 294; L 18:38; Douglass v. Pike County, 101 U. S. 677; L 25:968; Green County v. Conness, 109 U. S. 104; S 3:69; L 27:872; Carroll County v. Smith, 111 U. S. 556; S 4:539; L 28:507; Anderson v. Santa Anna, 116 U. S. 356; S 6:413; L 29:633; Knox County v. Ninth Bank, 147 U. S. 91; S 13:267; L 37:93; Folsom v. Ninety Six, 159 U. S. 611; S 16:174; L 40:278; Stanly County v. Coler, 190 U. S. 437; S 23:811; L 47:1126; Great Southern Hotel Co. v. Jones, 193 U. S. 532; S 24:576; L 48:778; Jetton v. University of the South, 208 U. S. 489; S 28:375; L 52:584.

CHAPTER LXXIV.

Principles Peculiar To Property Existing In the Form of Right Under Contract.

§ 458. Impairment.

We have, at earlier points, considered the question of Impairment.[1]

We may, however, here point out that Impairment is committed only by action of the public in its general capacity, not by action in its capacity (where such situation exists) of a party to a contract in question. That is to say, mere breach of such contract, by the public, is not Impairment.[2]

§ 459. Executed Contracts, as Such.

The Constitutional texts protective of property existing in the form of rights under contracts,[3] draw no distinction between executory, and executed contracts; but protect the latter as well as the former.[4]

§ 460. Contracts to Which the United States, a State of the Union, or a Federal State, is a Party.

The Federal Organic Contract and Property provisions apply to contracts to which the United States, a State of

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[1]Part I of the present Book; preceding Chapter of the present Part (§§ 444-457).

See also the succeeding Chapter (§§ 467-484: Franchise).

[2]St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142; S 21:575; L 45:788; Dawson v. Columbia Trust Co., 197 U. S. 178; S 25:420; L 49:713; Shawnee Sewerage Co. v. Stearns, 220 U. S. 462; S 31:452; L 55:544; McCormick v. Oklahoma City, 236 U. S. 657; S 35:455; L 59:771; Manila Investment Co. v. Trammell, 239 U. S. 31; S 36: 12; L 60:129.

The Federal Constitutional protection of contract does not operate retroactively, as against laws passed by or in a Foreign country, prior to its acquisition by the United States: as, in the case of such laws of Texas. League v. De Young, 11 How. 185; L 13:657.

[3]The Fifth Amendment, Property Clause; the Impairment Clause, and the Fourteenth Amendment.

[4]As, a conveyance of land (Fletcher v. Peck, 6 Cr. 87; L 3:162; Owings v. Speed, 5 Wh. 420; L 5:124); or a dedication of land. Cincinnati v. Louisville & Nashv. R. R., 223 U. S. 390, 399; S 32:267; L 56:481.

the Union, or a Federal State, is a promisor party (or grantor), as well as to contracts of a private promisor or grantor.[5]

Thus, a Treaty ("compact") effectually made between any two of the various Domestic Sovereign or quasi-Sovereign political societies of the Federal Realm,[6] was, prior to the Fourteenth Amendment, within the Impairment Clause of the Constitution.[7]

§ 461. Statutory Quasi-Contract.

Statutory quasi-contract of fixed liability, (as in the case of compulsory pilotage-fees), is within the Constitutional texts in question.[8]

§ 462. Consideration:—Sufficient if Valid when Given.

It is sufficient to existence and to validity of a contract, from the standpoint of Federal Organic protection, that the consideration was lawful at the time of the making of the contract.[9]

§ 463. Contract for a Contract.

A contract for the making of a future specified contract, is itself a contract within the Federal Organic Protection.[10]

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[5]Fletcher v. Peck, 6 Cr. 87; L 3:162; Green v. Biddle, 8 Wh. 1; L 5:547; (approved, Coyle v. Oklahoma, 221 U. S. 559, 577; S 31: 688; L 55:853); Curran v. Arkansas, 15 How. 304; L 14:705; McGee v. Mathis, 4 Wall. 143, 155; L 18:314; Hartman v. Greenhow, 102 U. S. 672; L 26:271; Hall v. Wisconsin, 103 U. S. 5; L 26: 302; Antoni v. Greenhow, 107 U. S. 769; S 2:91; L 27:468; Virginia Coupon Cases, 114 U. S. 269, 270; S 5:903; L 29:185; Walsh v. Columbus etc. R. R., 176 U. S. 469; S 20:393; L 44:548.

[6]I. e., The United States; the States of the Union, severally, and Federal States, severally.

[7]Green v. Biddle, cited above: a case of Compact between Virginia and the then prospective and inchoate State of Kentucky; but applicable broadly to the extent of the text.

As to the character in general, and broadly, of Treaty (or "Compact") as Contract, see Treaty.

[8]Steamship Co. v. Joliffe, 2 Wall. 450; L 17:805; (a pilotage-fee not affected by repeal of the statute, after tender of services, and accrual thereby of claim to fee).

[9]White v. Hart, 13 Wall. 646; L 20:685: sale of a slave; if valid when made, contract of payment not released by the Thirteenth Amendment. So, Osborn v. Nicholson, 13 Wall. 654; L 20:689; Boyce v. Tabb, 18 Wall. 546; L 21:757.

[10]Bedford v. Eastern Bldg. & Loan Ass'n, 181 U. S. 227; S 21:597; L 45:834.

§ 464. Incidents of Contract.

Pursuant to the general Doctrine of Incidents, Incidents of a contract right are within the Federal Organic conception, like the principal features.[11]

§ 465. Marriage Contract.

While the establishment of the Marriage status has an aspect of Contract, it is not within the scope, as Contract, of the Constitutional texts now in question, as against Divorce and Separation laws.[12]

§ 466. "Obligation" of a Contract.

The term "obligation" (of a contract), as employed in the Impairment clause, appears to intend, primarily, at least, the substantive binding character of a Contract.[13]

If so, or in so far as, it intends existing Remedy, it is considered elsewhere.[14]

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[11]Thus, when, by State law, the coupons of State bonds were (as matter of right on the part of the bondholder) tenderable in payment of taxes, they were so tenderable also for costs, in a judgment in favor of the State for taxes and costs. McGahey v. Virginia, 135 U. S. 662; S 10:972; L 34:304.

As to Remedy, generally, as an Incident of Contract, see Remedy (§§ 500-506).

[12]Hunt v. Hunt, Appendix to 131 U. S., p. clxv; L 24:1109.

[13]§§ 425, 426. [14]§§ 500-506.

CHAPTER LXXV.

Principles Peculiarly Applicable To Property Existing In the Form of Franchises.[1]

§ 467. Method of the Discussion.

Provisions of the State Constitutions, and of Federal and of State statute law—of higher or of lower plane—granting, or claimed to have granted, franchises, differ widely inter se; and the possible and actual variety of situations of fact, under a given text or type of text, is very great; and the authoritative decisions present, to a large extent, not doctrinal principles, but application of principles to particular situations, often differing but slightly inter se: with the result of impossibility of any great degree of exactness of generalization, in doctrinal form.[2]

A certain degree of classification, however, is practicable, by entering, to a certain extent, into the field of Interpretation, as distinguished from that of pure principle; and in addition to a statement of principles proper, we shall, in the present Chapter, undertake to present such a practical classification of applications of principles to typical situations.

§ 468. Franchise of Tax Exemption, Complete or Partial.

In respect of franchise of exemption, complete or partial, from taxation, various particularizations or specializations of the general principles considered in other sections, may be summarized as follows:

(1) "Special Taxes."—A grant, in general terms, of tax exemption, is presumptively limited to ordinary taxes, and does not include special assessments representing (or intended to represent) a corresponding increment in value

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[1]As to (a) the Property aspect and (b) the Contract aspect of Franchise, see § 445.

For principles applicable to, but not peculiar to, Franchise, see the preceding Chapters of Book V.

[2]See, to this effect, Phœnix Ins. Co. v. Tennessee, 161 U. S. 174, 179, 180; S 16:471; L 40:660.

to property in question.[3] This doctrine rests upon the ground, that in such case, there is, in legal contemplation, no net burden upon, and no net outgo from, the person or the property in question, but that there is rendered a full quid pro quo.[4]

(2) Increase Above the Amount of Capital Stock.—When tax-exemption runs to a corporation having a fixed maximum of capital stock, the exemption is, in the absence of specific provision to the contrary, to be viewed as applicable to all the property of the corporation, notwithstanding the fact that, by natural causes, the value of the property has come to exceed the face amount of the permitted capital stock.[5]

(3) Offer of Tax Exemption:—Acceptance, by Action.—Franchise of tax-exemption has often arisen, in practice, under a general offer, by the public, subject to acceptance by individual action contemplated by the offer: as, in the case of a general offer, by a State, of tax-exemption, for a term of years, to purchasers of swamp lands belonging to the State.[6]

In such a situation, the general Common Law principles of public general offer and of acceptance,[7] apply, upon the question of rise, and of definition, of the franchise, in favor of a particular individual.[8]

(4) Organization Under a Charter, as Acceptance.—The mere enactment of a statutory charter of a corporation, with a provision of tax-exemption, is a mere offer by the public, up to the point of organization under the charter. Up to that point, there is no acceptance, and there-

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[3]Illinois Centr. R. R. v. Decatur, 147 U. S. 190; S 13:293; L 37:132; Rochester Ry. v. Rochester, 205 U. S. 236; S 27:469; L 51:784.

[4]Case last cited.

The question might perhaps, easily arise, in a particular situation, if not generally, whether a general exemption, in futuro, from such special assessments, was within the tax-exemption power.

[5]Wright v. Georgia R. R. etc. Co., 216 U. S. 420; S 30:242; L 54:544.

[6]McGee v. Mathis, 4 Wall. 143; L 18:314.

[7]Such, e. g., as obtain in respect of an offer of a reward and in respect of offer of bounty (§ 451).

[8]McGee v. Mathis, cited above.

fore no tax-exemption contract; and the tax-exemption provision is revocable.[9]

§ 469. The Question of Exclusiveness.

1. As Against Private Competition.—In the view of the Federal law, a private franchise is presumptively not exclusive, as against the grant of a like franchise to other private persons.[10]

The presumption is, however, in practice, not infrequently overcome by particular circumstances establishing such exclusiveness.[11]

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[9]Planters' Ins. Co. v. Tennessee, 161 U. S. 193; S 16:466; L 40:667.

1. Examples of Existence and of Definition, of Tax Exemption.

Gordon v. Appeal Tax Court, 3 How. 133; L 11:529; Dodge v. Woolsey, 18 How. 331; L 15:401; Jefferson Branch Bank v. Skelly, 1 Bl. 436; L 17:173; McGee v. Mathis, 4 Wall. 143; L 18:314; Farrington v. Tennessee, 95 U. S. 679; L 24:558; Asylum v. New Orleans, 105 U. S. 362; L 26;1128; Tennessee v. Whitworth, 117 U. S. 129; S 6:645; L 29:830; Home Ins. Co. v. New York, 134 U. S. 594; S 10:593; L 33:1025; Bank of Commerce v. Tennessee, 161 U. S. 134; S 16:456; L 40:645; (as modified on re-hearing, 163 U. S. 416; S 16:1113; L 41:211); Wright v. Georgia R. R. etc. Co., 216 U. S. 420; S 30:242; L 54:544.

2. Cases of Unfounded Contention of Tax-Exemption.

Welch v. Cook, 97 U. S. 541; L 24:1112; Vicksburg etc. R. R. v. Dennis, 116 U. S. 665; S 6:625; L 29:770; Pennsylvania R. R. v. Miller, 132 U. S. 75; S 10:34; L 33:267; Sioux City Ry. v. Sioux City, 138 U. S. 98; S 11:226; L 34:898; Wilmington etc. R. R. v. Alsbrook, 146 U. S. 279; S 13:72; L 36:972; Shelby County v. Union Bank, 161 U. S. 149; S 16:558; L 40:650; Home Ins. Co. v. Tennessee, 161 U. S. 198; S 16:476; L 40:669; Central R. R. etc. Co. v. Wright, 164 U. S. 327; S 17:80; L 41:454; Citizens' Bank v. Owensboro, 173 U. S. 636; S 19:530; L 43:840; Wells v. Savannah, 181 U. S. 531; S 21:697; L 45:986; Theological Seminary v. Illinois, 188 U. S. 662; S 23:386; L 47:641; Wisconsin & Mich. Ry. v. Powers, 191 U. S. 379; S 24:107; L 48:229; Water, Light etc. Co. v. Hutchinson, 207 U. S. 385; S 28:135; L 52:257; Great Northern Ry. v. Minnesota, 216 U. S. 206; S 30:344; L 54:446.

[10]Charles River Bridge v. Warren Bridge, 11 Pet. 420; L 9:773; The Binghampton Bridge, 3 Wall. 51; L 18:137.

[11]Bridge Prop'rs v. Hoboken Co., 1 Wall. 116; L 17:571; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; S 6:252; L 29:516; New Orleans Water-Works Co. v. Rivers, 115 U. S. 674; S 6:273; L 29:525; St. Tammany Water Works v. New Orleans Water

2. As Against Public Competition.—The same presumption obtains in respect of exclusiveness of a franchise as against competition by the public in its organized capacity;[12] and the presumption may, perhaps, in view of general principles elsewhere considered,[13] be said to be of greater strength.

In this field also, however, instances of failure of the presumption (and of exclusiveness as against the organized public) are presented in practice.[14]

§ 470. Public Policy as Distinguished from Franchise-Grant.

It constantly happens that conditions peculiarly beneficial to one or to another individual or class, and of such character as to be potential subject-matter of franchise-grant, exist, not by way of franchise-grant, but as mere matter of Public Policy for the time being: as, in the case of a general law inhibiting to local authorities the licensing of a ferry within a certain distance of an existing ferry.[15]

The most familiar illustration of such situation is seen in the widely prevailing exemption from taxation, of property used for religious or charitable purposes. Such exemption is, presumptively, mere matter of Public Policy for the time being, and revocable at pleasure, whether the exemption be general, in terms, in respect of certain classes of property, or specific in respect of a certain property.[16]

§ 471. Subjectivity to Future Public Policy.

Pursuant to a general principle,[17] every franchise, of whatever character, and however specific in terms, is sub-

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Works, 120 U. S. 64; S 7:405; L 30:563; City Ry. v. Citizens R. R., 166 U. S. 557; S 17:653; L 41:1114.

[12]Skaneateles Water Works Co. v. Skaneateles, 184 U. S. 354; S 22:400; L 46:585; Joplin v. Light Co., 191 U. S. 150; S 24:43; L 48:127; Knoxville Water Co. v. Knoxville, 200 U. S. 22; S 26:224; L 50:353.

[13]§ 472.

[14]Vicksburg v. Vicksburg Water-Works Co., 202 U. S. 453; S 26:660; L 50:1102.

[15]Williams v. Wingo, 177 U. S. 601; S 20:793; L 44:905.

[16]Christ Church v. Philadelphia, 24 How. 300; L 16:602; Grand Lodge v. New Orleans, 166 U. S. 143; S 17:523; L 41:951.

[17]§§ 431-434.

ject to change, in futuro, in the particulars of Public Policy.[18]

§ 472. Strict Construction.

In accordance with a general Common Law principle of public grants, grants of tax-exemption are construed strictly in favor of the public. Thus, where State-granted lands were, in terms, tax-exempt until sold by the grantee,

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[18]Eagle Ins. Co. v. Ohio, 153 U. S. 446; S 14:868; L 38:778; (validity of new State requirement of statements of condition, etc.);

Northern Pac. Ry. v. Duluth, 208 U. S. 583; S 28:341; L 52:630; Chicago, B. & Q. R. R. v. Nebraska, 170 U. S. 57; S 18:513; L 42:948; Cincinnati etc. Ry. v. Connersville, 218 U. S. 336; S 31:93; L 54:1060; Chicago, Milw. & St. Paul Ry. v. Minneapolis, 232 U. S. 430; S 34:400; L 58:671 (valid requirement of construction of a railroad bridge over a city street);

Fifth Ave. Coach Co. v. New York, 221 U. S. 467; S 31:709; L 55:815; (valid prohibition of use of the exterior of the vehicles of a coach-line for advertising);

Chicago, B. & Q. R. R. v. Cram, 228 U. S. 70; S 33:437; L 57:734; (valid State regulation of speed of intra-State cattle-trains);

St. Louis & San Francisco Ry. v. Mathews, 165 U. S. 1; S 17:243; L 41:611; (valid imposition upon a railroad of absolute liability for fires, with privilege of insuring against the risk);

Gladson v. Minnesota, 166 U. S. 427; S 17:627; L 41:1064; (stops of intrastate trains at county seats);

So, Erie R. R. v. Williams, 233 U. S. 685; S 34:761; L 58:1155; Missouri Pac. Ry. v. Omaha, 235 U. S. 121; S 35:82; L 59:157;

Seaboard Air Line v. Georgia R. R. Comm., 240 U. S. 324; S 36:260; L 60:669, (compulsory track connection);

Southern Wisconsin Ry. v. Madison, 240 U. S. 457; S 36:400; L 60:739 (compulsory paving by a street railway corporation); Minneapolis & St. Louis Ry. v. Emmons, 149 U. S. 364; S 13:870; L 37:769; (compulsory fencing of railroad's right of way);

Charlotte etc. Ry. v. Gibbes, 142 U. S. 386; S 12:255; L 35:1051; (charging upon railroads the expense of a Railroad Commission);

Beer Co. v. Massachusetts, 97 U. S. 25; L 24:989; (prohibitory law operative as against an existing brewing Company's charter);

Douglas v. Kentucky, 168 U. S. 488; S 18:199; L 42:553; (anti-lottery law: operative as against existing lottery franchise); New Orleans Gas Co. v. Drainage Comm'rs, 197 U. S. 453; S 25:471; L 49:831; (compulsory change of location of gas-pipes); Railroad v. Richmond, 96 U. S. 521; L 24:734 (regulation of street railroad);

Chicago & Alton R. R. v. Transbarger, 238 U. S. 67; S 35:678; L 59:1204; (compulsory establishment by railroads of drainage channels under right of way).

an equitable transfer was held terminable of the exemption.[19]

So, a contract between the public and a private person, natural or artificial, that a specified form or amount of tax shall be laid in favor of, or for the benefit of such individual, means (in the absence of specific provision to the contrary) a tax upon such subjects as the taxing public may, as matter of future Public Policy deem it proper not to exempt.[20]

A charter grant of "powers and privileges" described as those possessed by another specified corporation, does not include exemption from taxation.[21]

Tax exemption presumptively does not run pending lease of a property-res in question, and actual use by the lessee exclusively.[22]

Tax exemption of land presumptively does not extend to a lessee thereof in respect of his interest as lessee.[23]

§ 473. Patent and Copyright Franchise.

Letters Patent, and Copyright, may, and presumptively do, embody an irrevocable franchise, for the term fixed.[24] Such franchise rights are, however, subject to the qualifications and limitations appertaining to franchises in general. They are for example, subject, as property, to an existing or a future Federal Public Policy adverse to monopoly and restraint of trade.[25]

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[19]Winona etc. Land Co. v. Minnesota, 159 U. S. 526; S 16:83; L 40:247. See also Wheeling & Belmont Bridge v. Wheeling Bridge, 138 U. S. 287; S 11:301; L 34:967; Stein v. Bienville Water Co., 141 U. S. 67; S 11:892; L 35:622; Helena Water Works Co. v. Helena, 195 U. S. 383; S 25:40; L 49:245; Chicago, B. & Q. Ry. v. Drainage Comm'rs, 200 U. S. 561; S 26:341; L 50:596; Blair v. Chicago, 201 U. S. 400; S 26:427; L 50:801.

[20]Arkansas Southern Ry. v. Louisiana & Arkansas Ry., 218 U. S. 431; S 31:56; L 54:1097.

[21]Wright v. Georgia R. R. etc. Co., 216 U. S. 420; S 30:242; L 54:544;

[22]Morris Canal Co. v. Baird, 239 U. S. 126; S 36:28; L 60:177.

[23]Jetton v. University of the South, 208 U. S. 489; S 28:375; L 52:584.

[24]Crozier v. Krupp, 224 U. S. 290; S 32:488; L 56:771.

[25]Bobbs-Merrill Co. v. Straus, 210 U. S. 339; S 28:722; L 52:1086; Straus v. American Publishers' Ass'n, 231 U. S. 222; S 34:84; L 58:192; Bauer v. O'Donnell, 229 U. S. 1; S 33:616; L 57:1041.

(Henry v. Dick Co., 224 U. S. 1; S 32:364; L 56:645, rested

§ 474. Tax Exemption:—Not, in General, by Implication.

Without going so far as to say that in no case will a franchise of tax-exemption be implied, the general rule may be laid down, that the grant must be explicit in terms. Thus, tax-exemption is not implied from the mere admission of a foreign corporation,[26] or from the mere grant to a corporation of the privilege of supplying gas to a municipality.[27]

The sale or lease by a municipal corporation, for a large return, of a street-railway franchise, does not carry exemption from an occupation-tax.[28]

So, a city which has leased land owned by the city, at a time when the city had no taxing power, may tax the land, upon subsequently acquiring such power.[29]

So when, under a specific law, private individuals purchased the property and corporate franchise of a corporation, and were to become a corporation, there was no implied exemption from tax upon the privilege of becoming a corporation.[30]

§ 475. Limitative Definition, by Existing Law.

Existing Substantive law enters as an element of limitative definition, into a grant of franchise.[31] The principle

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upon a narrow and highly exceptional situation of fact, and is not in conflict with the other cases cited).

[26]Home Ins. Co. v. Augusta, 93 U. S. 116; L 23:825.

[27]Memphis Gas Co. v. Shelby County, 109 U. S. 398; S 3:205; L 27:976.

[28]New Orleans City etc. R. R. v. New Orleans, 143 U. S. 192; S 12:406; L 36:121; St. Louis v. United Railways, 210 U. S. 266; S 28:630; L 52:1054.

[29]Perry Co. v. Norfolk, 220 U. S. 472; S 31:465; L 55:548.

[30]Schurz v. Cook, 148 U. S. 397; S 13:645; L 37:498; Grand Rapids etc. Ry. v. Osborn, 193 U. S. 17; S 24:310; L 48:598.

[31]Thus, existing statute law providing for an exceptional degree of care on the part of corporations, enters (in the absence of affirmative provision to the contrary) into the charter of every domestic corporation. Chicago, Rock Isl. & Pac. Ry. v. Zernecke, 183 U. S. 582; S 22:229; L 46:339.

So, of an existing statutory provision for half-fare for school-children on street-railways. Interstate Ry. v. Massachusetts, 207 U. S. 79; S 28:26; L 52:111.

includes not merely specific and peculiarly pertinent existing law, but existing principles of Public Policy.[32]

§ 476. Capitalization, as a Fixed Franchise, of an Expectation of a Public Gratuity.

A franchise (as, that of gas supply) held by a public service corporation, and subject to public regulation of rates, may, (as represented by the shares of its capital stock), have a market value based, in part, upon an expectation that a gratuitously high rate, of the past, and of the present, will be permitted for the future.

The view has been expressed that it is competent to a Legislative body to allow such mere expectation to be capitalized, in perpetuity, or for a fixed term of years, at the market estimate of its value; and to allow stock to be issued against it; and to make such expectation, so valued and so capitalized, a binding burden upon the consumer public.[33]

Since any rate, in futuro, in so far as in excess of a reasonable return on investment, would (apart from such permissive capitalization of expectation) be a pure gratuity, it follows that such capitalization would be a present capitalization of a present expectation of a future gratuity.

This doctrine also involves the proposition that a public may bind itself, in futuro, to a gratuity (representing no advantage to the public) to private individuals.

This view rests upon the ground of protection of private property-right in franchise form; but the question may be raised whether it is consistent with a property-right of the consumer public: namely, a right not to be subjected to excessive rates, or to a pure gratuity of no public benefit.

§ 477. Fixed Investment: Effect upon Franchise.

When a franchise necessarily or naturally contemplates a fixed investment of capital, actual such investment thereunder, as made, operates correspondingly upon the breadth or the permanence of the franchise, in favor of the holder

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[32]E. g., an existing Public Policy of Legislative reorganization of insolvent corporations. Powers v. Detroit, Grand Haven etc. Ry., 201 U. S. 543; S 26:556; L 50:860.

[33]Willcox v. Consolidated Gas Co., 212 U. S. 19, 43-47; S 29:192; L 53:382.

thereof, to such extent as is necessary, under considerations of natural justice, for protection of his such investment.

This result may be viewed either (a) from the standpoint of Contract, or (b) from the standpoint of property-res. From the former standpoint, it represents an enlargement, by implied contract, of the original contract of grant of the franchise. From the latter standpoint, it represents accretion, (under the general principles of accretion) to the franchise as a property-res.

Thus, a municipal permit for the erection of a gas-plant, followed by large fixed investment, has been held to create a property-right to maintenance of the plant,—no consideration of Public Policy having intervened.[34]

In another case, the life of domestic corporations of a certain State was, by general law, twenty years. A corporation of another State was admitted, under a general law, upon payment of an initial fee based upon the amount of its capital stock; and invested a large sum in a non-removable plant. There was a statutory provision that foreign corporations should be subject only to such liabilities as applied to domestic corporations. It was held that under these circumstances, the foreign corporation had acquired a right of twenty years of existence in the State, and upon the same tax footing as domestic corporations.[35]

This view has been applied in the case of telegraph or telephone poles in public streets,[36] and to water-plants.[37]

The principle goes, however, only to the extent required by natural justice, and yields to the requirements of justice to the public. Thus, where a street-railway franchise is lost by default in performance of conditions, removal of rails may be ordered.[38]

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[34]Dobbins v. Los Angeles, 195 U. S. 223; S 25:18; L 49:169.

[35]American Smelting Co. v. Colorado, 204 U. S. 103; S 27:198; L 51:393.

[36]Owensboro v. Cumberland Teleph. Co., 230 U. S. 58; S 33:988; L 57:1389; Old Colony Trust Co. v. Omaha, 230 U. S. 100; S 33:967; L 57:1410.

[37]Boise Water Co. v. Boise City, 230 U. S. 84; S 33:997; L 57:1400.

[38]Detroit United Ry. v. Detroit, 229 U. S. 39; S 33:697; L 57:1056.

See § 471 and cases cited.

§ 478. Principal and Attendant Franchises.

Very commonly, franchises other than that of mere corporate existence, are held by corporations—there being presented thereby two stages of franchise: the corporate, and what we may call the specific, franchise. Thus, a railroad corporation has, first, its mere franchise of corporate existence; and, thereunder, a franchise of exercise of the public's right of Eminent Domain, for obtaining a roadway.

This simple typical situation is, of course, capable of unlimited elaboration; and great variety of elaboration is presented in practice, as, in the case of great multi-State railroad systems.

In such cases, the distinction between (a) franchise of mere corporate existence, and (b) attendant other franchises is always to be borne in mind; but the same general principles apply to both, and to all classes of franchises alike.[39]

§ 479. Severability of Attendant Franchises.

We have considered above the co-existence, in one holder, of a primary and of an attendant franchise. There is no principle to the effect that different franchises, so held, are necessarily limited or qualified in substance, one by the other. Thus, if there be granted to a corporation, limited to a fixed period of life, a franchise of a fixed term of greater duration, the latter franchise does not necessarily or presumptively expire with the expiration of the life of the corporation, but may remain as an asset for late shareholders of the corporation, or for creditors.[40]

§ 480. Reservation of Power of Modification or of Revocation: (Reservation of Right of Repeal or of Amendment).

A reservation, in terms, in a grant of a franchise, of right of modification or of revocation, is, in strictness, not a reservation, but rather a limitative feature of definition of the term of the franchise, by putting the franchise-holder

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[39]See § 479.

[40]Detroit v. Detroit Citizens' Street Ry., 184 U. S. 368; S 22:410; L 46:592; Minneapolis v. Street Ry., 215 U. S. 417; S 30:118; L 54:259.

on a footing analogous (according to the particular circumstances) to that of a tenant at will, or even of a mere licensee.[41]

The question whether, in a given instance, and within what limits, such power has been reserved, is a question of the law of the power (Federal or State) granting the franchise. The question of the limit of potential scope of such a reservation is, however, a question strictly of Federal Organic Property law.[42]

Such a reservation is viewed by the Federal law as presumptively not lost by subsequent grant of further franchise or privilege, and action thereunder: as, of power of mortgage, and execution of a mortgage.[43]

In considering authorities to be cited below, it is to be borne in mind that in many if not in most instances, in practice, public action (in question, and Federally justified), might perhaps have been justifiable by the general principle of subjectivity of all franchises to Public Policy, present and future: and that, in such cases, reservation of right of revocation, or of repeal or amendment, is referred to, rather as the most convenient, than as a necessary, support for the decision.

Typical examples of public action, viewed as justified by such reservation (but possibly in some, or in all instances, justifiable on general grounds) may be cited as follows: transfer of the power of fixing water rates from a board of arbitrators chosen in the usual manner, to certain officials of a municipal corporation in question;[44] abatement of railroad grade-crossings, at the expense of the railroad;[45] requirement upon Federally incorporated subsidy rail-

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[41]As, in the case of a franchise of admission of a foreign corporation (see Foreign Corporations, §§ 278-289); or in a case of pure Common Law license:—constituting a franchise only in the sense of being (a) granted by the public and (b) granted to a corporation: as in Chicago, B. & Q. Ry. v. Drainage Comm'rs, 200 U. S. 561; S 26:341; L 50:596.

[42]Cases cited below, adverse to action taken or attempted, within the textual limits of such power.

[43]Calder v. Michigan, 218 U. S. 591; S 31:122; L 54:1163.

[44]Spring Valley Water Works v. Schottler, 110 U. S. 347; S 4:48; L 28:173.

[45]New York & New Eng. R. R. v. Bristol, 151 U. S. 556; S 14:437; L 38:269.

roads, of maintenance, independently of other corporations, of telegraph lines for railroad, governmental, and commercial use;[46] provision for cumulative voting by shareholders of corporations, with a view to minority representation in the board of directors;[47] authority for, or requirement of, change of insurance corporations from the assessment to the fixed premium plan;[48] subjection of banking corporations to assessment for a general depositors' guaranty fund.[49]

The reservation is, however, (as matter of Federal Organic Property law) limited in scope to such public action as is consistent with the Federal Organic conception of Property right. Thus, a reserved right of repeal of a charter of a charitable corporation was held not to permit of a revocation of a tax-exemption franchise not otherwise revocable;[50] and, in general, the reservation is not operative upon specific franchise rights: as, upon a franchise of exclusive water-supply,[51] or on a property-right of a general character, held under a franchise in question. Thus, a reservation clause in a State railroad charter does not justify a State requirement of sale of intra-State mileage-books at a rate lower than the general rate.[52]

§ 481. Modes of Loss of a Primary, or of a Separable Attendant, Franchise.

The question whether a franchise of any class becomes lost or forfeited during the projected term of its existence, turns, in each case, upon ordinary Common Law principles. Thus, a Legislative re-organization of an insolvent

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[46]United States v. Union Pac. Ry., 160 U. S. 1; S 16:190; L 40:319.

[47]Looker v. Maynard, 179 U. S. 46; S 21:21; L 45:79.

[48]Polk v. Mutual Reserve Fund, 207 U. S. 310; S 28:65; L 52:222. See also Wright v. Minnesota Mut. L. Ins. Co., 193 U. S. 657; S 24:549; L 48:832.

[49]Noble Bank v. Haskell, 219 U. S. 104; S 31:186; L 55:112; 219 U. S. 575; S 31:299; L 55:341; Assaria Bank v. Dolley, 219 U. S. 121; S 31:189; L 55:123.

[50]Asylum v. New Orleans, 105 U. S. 362; L 26:1128.

[51]Bienville Water Co. v. Mobile, 186 U. S. 212, 222; S 22:820; L 46:1132.

[52]Lake Shore etc. Ry. v. Smith, 173 U. S. 684; S 19:565; L 43:858.

corporation does not, in and of itself, work a termination of corporate existence, or a loss of a franchise of tax exemption.[53]

Voluntary acceptance by a corporation of an amendment to its charter, presumptively operates to bring the corporation under general laws newly existing at the time of the amendment, and thereby—presumptively, at least—operates to terminate a separable franchise (as, a franchise of tax-exemption or of exclusiveness of a franchise right) forbidden by law existing at the time of the amendment.[54]

Within this principle is the situation of voluntary material change by a corporation, under general corporation laws, of the scope or character of its field of action. Thus, such change from the character of insurance corporation, to that of banking corporation, was held to work a loss of tax-exemption previously existing.[55]

Change from individual to corporate character, may terminate tax-exemption.[55]

Adverse possession (or the equivalent of it) may operate to devest (or to be conclusive of devestment of) a private right: as, in the case of acquiescence, without protest, in taxation over a long period of years.[57]

§ 482. Corporation Franchise:—Situation on Expiration.

The expiration of a corporation's franchise does not vest in the public, property other than the franchise held by the corporation; but leaves it in the members of the late corporation.[58]

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[53]Central R. R. etc. Co. v. Georgia, 92 U. S. 665; L 23:757; Powers v. Detroit, Grand Haven etc. Ry., 201 U. S. 543; S 26:556; L 50:860.

[54]Southwestern R. R. v. Wright, 116 U. S. 231; S 6:375; L 29:626 (loss of tax-exemption).

[55]Memphis Bank v. Tennessee, 161 U. S. 186; S 16:468; L 40:664.

[56]Interborough Transit Co. v. Sohmer, 237 U. S. 276; S 35:549; L 59:951.

[57]Given v. Wright, 117 U. S. 648; S 6:907; L 29:1021 (the period here being sixty years).

[58]See Cleveland Elec. Ry. v. Cleveland, 204 U. S. 116; S 27:202; L 51:399.

§ 483. The Question of Assignability.

It is competent to a public, Federal or State, in creating a franchise, to make it assignable, or non-assignable, within prescribed limitations. With that matter, the Federal Organic law has no concern. The question of assignability, in a given instance, arises, therefore, (as a question of Federal Organic law), only collaterally to some question of property-right turning upon presence or absence, (in, and for the purpose of, the instance in question), of assignability. In such situation, resort is had to general principles of Federal non-Organic law: that is to say, to the Common Law as Federally adopted.

The principles may be summarized as follows:—

(1) In the absence of affirmative provision, by the power creating a franchise, the grant of the franchise is personal to the grantee, and is not capable of transfer, in any form or in any degree.[59]

(2) Consequently, a given franchise is presumptively thus non-transferable.

(3) As a further consequence, a grant of transferability is to be construed strictly.

(4) Where there exist, in one hand, a group of principal and attendant franchises;[60] and certain of the attendant franchises[61] are, in their nature, and under the circumstances, separable, a provision, in general terms, for transferability, in certain eventualities, is presumptively lim-

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[59]Jetton v. University of the South, 208 U. S. 489; S 28:375; L 52:584. (Land of an educational corporation was, in terms, tax-exempt. The exemption was held not to extend to lessees of portions of the land, to the extent of the leasehold value).

Oregon Ry. v. Oregonian Ry., 130 U. S. 1; S 9:409; L 32:837 (lease of a railroad; invalid, in the absence of affirmative authority thereto).

For an exceptional instance, (of tax-exemption held to run with the land), see New Jersey v. Wilson, 7 Cr. 164; L 3:303: affirmed in Given v. Wright, 117 U. S. 648; S 6:907; L 29:1021, but with a doubt (p. 655) as to the conclusion, if the question had been a new one.

[60]As, (in a possible case of a railroad corporation), some or all of the following franchises: (a) the franchise of corporate existence; (b) the franchise of exercise of Eminent Domain; (c) the franchise of carrying on traffic; (d) a franchise of exclusiveness (as against the public, or as against private competition, or both); (e) a franchise of a fixed minimum scale of rates; and (f) a franchise of tax-exemption.

ited, in respect of franchises, to such principal franchises; and presumptively does not include such separable franchises.

The principle has been applied in the case of a Judicial sale of property and franchises, for enforcement of a lien (retained by the public in the creation of a railroad franchise), for money or credit advanced;[62] in the case of Judicial mortgage-foreclosure sales;[63] in the case of Judicial Insolvency sales;[64] in the case of transfers taking place in, or as incidents of, authorized merger or consolidation of corporations.[65]

The principle is, however, merely one of Interpretation; and the presumption of such non-transferability has in various instances been overthrown. Thus, in the exceptional situation of expiration of corporate existence, pending the life of a specific franchise held by the corporation, the specific franchise has been held presumptively to have passed to the individual shareholders of the late corpora-

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[61]E. g., that of fixed minimum rates, and that of tax-exemption.

[62]Railroad v. Hamblen County, 102 U. S. 273; L 26:152; Picard v. Tennessee etc. R. R., 130 U. S. 637; S 9:640; L 32:1051.

[63]Morgan v. Louisiana, 93 U. S. 217; L 23:860; Memphis R. R. v. Comm'rs, 112 U. S. 609; S 5:299; L 28:837; Chesapeake & O. Ry. v. Miller, 114 U. S. 176; S 5:813; L 29:121; Norfolk & Western R. R. v. Pendleton, 156 U. S. 667; S 15:413; L 39:574; Grand Rapids etc. Ry. v. Osborn, 193 U. S. 17; S 24:310; L 48:598.

[64]Mercantile Bank v. Tennessee, 161 U. S. 161; S 16:461; L 40:656.

[65]Consolidation of two or more corporations, is dissolution, and terminates a non-repeal charter. Shields v. Ohio, 95 U. S. 319; L 24:357; Railroad v. Maine, 96 U. S. 499; L 24:836; St. Louis, Iron Mtn. etc. Ry. v. Berry, 113 U. S. 465; S 5:529; L 28:1055; Keokuk etc. R. R. v. Missouri, 152 U. S. 301; S 14:592; L 38:450; Norfolk & Western R. R. v. Pendleton, 156 U. S. 667; S 15:413; L 39:574; St. Louis & San Francisco Ry. v. Gill, 156 U. S. 649; S 15:484; L 39:567; Minneapolis etc. Ry. v. Gardner, 177 U. S. 332; S 20:653; L 44:793; Yazoo & Miss. R. R. v. Adams, 180 U. S. 1; S 21:240; L 45:395; Northern Centr. Ry. v. Maryland, 187 U. S. 258; S 23:62; L 47:167; Grand Rapids etc. Ry. v. Osborn, 193 U. S. 17; S 24:310; L 48:598; Shaw v. Covington, 194 U. S. 593; S 24:754; L 48:1131; Rochester Ry. v. Rochester, 205 U. S. 236; S 27:469; L 51:784; Yazoo & Miss. R. R. v. Vicksburg, 209 U. S. 358; S 28:510; L 52:833.

tion, and to be assignable by them to a new corporation created to hold it.[66]

§ 484. Rates as Property.

The fundamental element, in property capable only of commercial use, is: capacity of earnings; and such right is, in itself, "property," within the view of the Federal Organic law.

Questions in this field resolve themselves, in practice, into questions of the amount of rates to which, in the case of public service corporations, the right extends. In the absence, heretofore, and at present, of full data in respect of the amount of investment, or of present value, the Judicial dealing with the subject has necessarily been tentative.

(1) The general principle is: that a franchise-holder is, as matter of right, entitled to a fair return upon the amount that he has, in one way or another, invested under the franchise, from his own means.[67]

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[66]Detroit v. Detroit Citizens' Street Ry., 184 U. S. 368; S 22:410; L 46:592; Minneapolis v. Street Ry., 215 U. S. 417; S 30:118; L 54:259.

[67]Dow v. Beidelman, 125 U. S. 680; S 8:1028; L 31:841; Covington Turnpike Co. v. Sandford, 164 U. S. 578; S 17:198; L 41:560; San Diego Land Co. v. National City, 174 U. S. 739; S 19:804; L 43:1154; Chicago, Milw. & St. P. Ry. v. Tompkins, 176 U. S. 167; S 20:336; L 44:417; Freeport Water Co. v. Freeport, 180 U. S. 587; S 21:493; L 45:679; Knoxville Water Co. v. Knoxville, 189 U. S. 434; S 23:531; L 47:887; San Diego Land etc. Co. v. Jasper, 189 U. S. 439; S 23:571; L 47:892; Owensboro v. Owensboro Waterworks Co., 191 U. S. 358; S 24:82; L 48:217; Stanislaus County v. San Joaquin Co., 192 U. S. 201; S 24:241; L 48: 406; Illinois Centr. R. R. v. Interstate Com. Comm., 206 U. S. 441; S 27: 700; L 51: 1128; Knoxville v. Knoxville Water Co., 212 U. S. 1; S 29:148; L 53:371; Willcox v. Consolidated Gas Co., 212 U. S. 19; S 29:192; L 53:382; (as to the view expressed in that case, pp. 42-47, as to capitalization of future excess rate, see § 476); Louisiana R. R. Comm. v. Cumberland Telegr. Co., 212 U. S. 414; S 29:690; L 53:662; Louisville v. Cumberland Tel. & Tel. Co., 225 U. S. 430; S 32:741; L 56:1151; Minnesota Rate Cases, 230 U. S. 352; S 33: 729; L 57:1511; Missouri Rate Cases, 230 U. S. 474; S 33:975; L 57:1571; Southern Pac. Co. v. Campbell, 230 U. S. 537; S 33:1027; L 57:1610; Allen v. St. Louis, Iron Mtn. etc. Ry., 230 U. S. 553; S 33:1030; L 57:1625; Northern Pac. Ry. v. North Dakota, 236 U. S. 585; S 35:429; L 59:735; Norfolk & Western Ry. v. West Virginia, 236 U. S. 605; S 35:437; L 59:745.

(2) It is competent to Congress, or to a State (in the Federal and State spheres of action, respectively), to fix, by agreement, a rate for the future, upon sound economic principles, and to make such rate a fixed feature of a franchise.[68]

(3) Presumptively,—as matter of Interpretation—a provision as to rates in futuro, is to be taken to mean rates as to be fixed from time to time, in future.[69]

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[68]Detroit v. Detroit Citizens' Street Ry., 184 U. S. 368; S 22:410; L 46:592; Cleveland v. Cleveland City Ry., 194 U. S. 517; S 24: 756; L 48:1102; Cleveland v. Cleveland Elec. Ry., 201 U. S. 529; S 26:513; L 50:854; Minneapolis v. Street Ry., 215 U. S. 417; S 30:118; L 54:259.

[69]Freeport Water Co. v. Freeport, 180 U. S. 587; S 21:493; L 45: 679.

CHAPTER LXXVI.

Natural Water Areas, and Their Incidents, as Property.

§ 485. The General Principle.

The Common Law conception of a natural water area includes the bed; the water—(a) as a stratum of the land; (b) as a possible highway, and (c) as a commodity;—the fixed animal or vegetable inhabitants of the bed or of the water; and the super-incumbent air-space: all as land; and the Common Law particulars of title, applicable to such land as a whole, or to such component elements of it, respectively, are adopted by the Federal Organic law.[1]

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[1]1]* Water as a Commodity.—Sturr v. Beck, 133 U. S. 541; S 10: 350; L 33: 761; Water Power Co. v. Water Comm'rs, 168 U. S. 349; S 18: 157; L 42: 497; Montezuma Canal v. Smithville Canal, 218 U. S. 371; S 31: 67; L 54: 1074 (cases of statutory appropriation of publicly owned water); Hudson Water Co. v. McCarter, 209 U. S. 349; S 28: 529; L 52: 828 (no inherent right, in a private riparian owner, to take water from a stream within a State, for sale outside the State).

Fallbrook Irrig'n Dist. v. Bradley, 164 U. S. 112; S 17: 56; L 41: 369; Long Island Water Co. v. Brooklyn, 166 U. S. 685; S 17: 718; L 41: 1165; Hooker v. Los Angeles, 188 U. S. 314; S 23: 395; L 47: 487, (takings, under Eminent Domain, of water as a commodity).

2] Water Area as the Subject of a Property Easement of Navigation.—See § 487.

3] Fixed Animal Inhabitants (Typically, Shell-Fish).—Den v. Jersey Co., 15 How. 426; L 14: 757; McCready v. Virginia, 94 U. S. 391; L 24: 248 (illustrating property character in oyster-beds, and in oysters therein, by the right of a State, holding the title thereto, to exclude citizens of other States); Martin v. Waddell, 16 Pet. 367; L 10: 997.

4] Free-Moving Animal Inhabitants:—(Typically, Free-Swimming Fish.)—Manchester v. Massachusetts, 139 U. S. 240; S 11: 559;

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*Dark-faced numerals are inserted in the footnotes merely for convenience of reference.

The Property aspect is further illustrated in State power, in general, over the matter of particulars of title in intra-State water areas, and in component features, (bed-soil, shell-fish, etc.) in such areas; and in alluvion, etc.[2]

§ 486. Public or Private.

1. In the areas of the original thirteen States, title, held by the British Crown, to land of any class, (and therefore to water-area, as land, with its Incidents) passed, upon the establishment of American Independence, directly to the several States, in so far as it was within State area;[3] and, in so far as it was within Federal area, (then the North-west Territory), necessarily vested in the United States.[4]

2. In the subsequent acquisition of other territory as Federal area, (as, in the case of the Louisiana Purchase), there has vested in the United States, as successor to the previous Sovereign, title to various water areas.[5]

L 35:159; Lawton v. Steele, 152 U. S. 133; S 14:499; L 38:385 (power, in a State, as Parens Patriae, to protect fish from extinction or undue diminution by nets and seines).

5] Vegetable Aquatic Growths.—The Abby Dodge, 223 U. S. 166; S 32:310; L 56:390: sponges, in intra-State Ocean water; inherent right to intra-State commerce therein; (indictment defective only for not excluding intra-State commerce).

6] The Bed-Soil.—Pollard's Lessee v. Hagan, 3 How. 212; L 11: 565; Packer v. Bird, 137 U. S. 661; S 11:210; L 34:819; Mitchell v. Smale, 140 U. S. 406; S 11:819; L 35:442; Kaukauna Co. v. Green Bay Canal, 142 U. S. 254; S 12:173; L 35: 1004; Water Power Co. v. Water Comm'rs, 168 U. S. 349; S 18:157; L 42:497; other cases cited in the present Chapter.

[2]7] Hardin v. Jordan, 140 U. S. 371; S 11:808; L 35:428; Sweringen v. St. Louis, 185 U. S. 38; S 22:569; L 46:795; Kean v. Calumet Canal Co., 190 U. S. 452; S 23:651; L 47:1134; Hardin v. Shedd, 190 U. S. 508; S 23:685; L 47:1156; Whitaker v. McBride, 197 U. S. 510; S 25:530; L 49:857; Joy v. St. Louis, 201 U. S. 332; S 26:478; L 50:776; United States v. Chandler-Dunbar Co., 209 U. S. 447; S 28:579; L 52:881; Archer v. Greenville Gravel Co., 233 U. S. 60; S 34:567; L 58:850.

[3]Martin v. Waddell, 16 Pet. 367; L 10:997; Den v. Jersey Co., 15 How. 426; L 14:757; Smith v. Maryland, 18 How. 71; L 15:269; McCready v. Virginia, 94 U. S. 391; L 24:248; Hoboken v. Pennsylvania R. R., 124 U. S. 656; S 8:643; L 31:543; Manchester v. Massachusetts, 139 U. S. 240; S 11:559; L 35:159; Lee v. New Jersey, 207 U. S. 67; S 28:22; L 52:106.

[4]Cases cited below.

[5]Pollard's Lessee v. Hagan, 3 How. 212; L 11:565; Mobile Trans'n Co. v. Mobile, 187 U. S. 479; S 23:170; L 47:266.

3. It has been, and is, competent to the States, severally, to transfer at pleasure, the State's property-title, in such water-areas, owned by the State. The transfer has, in some States, been made by general law, operative in favor of riparian owners, as such, by way of donation.[6]

4. It has, at all periods, been competent to Congress to pass such title, held by the United States. It has, in general, been the policy of Congress, in making grants to private persons, of riparian land, to grant only to the water, in the case of navigable waters,[7] and with reservation, in general, of islands of any practical importance,[8] but not of small insignificant islands;[9] and, upon creation of a new State in and from Federal area, to vest in the State, legal title in such water-areas then owned by the United States.[10]

5. Conveyance from the United States, or from a State, may (as in transfer of title in general) be outright, or qualified, at pleasure.[11]

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[6]See Hardin v. Jordan, 140 U. S. 371; S 11:808; L 35:428.

[7]Pollard's Lessee v. Hagan, cited above; Yates v. Milwaukee, 10 Wall. 497; L 19:984; Transportation Co. v. Parkersburg, 107 U. S. 691, 699; S 2:732; L 27:584; Sturr v. Beck, 133 U. S. 541; S 10:350; L 33:761; Illinois Centr. R. R. v. Illinois, 146 U. S. 387; S 13:110; L 36:1018; and, (as Illinois v. Illinois Centr. R. R.), 184 U. S. 77; S 22:300; L 46:440; Shively v. Bowlby, 152 U. S. 1; S 14:548; L 38:331.

For instances of establishment of title (in a Territory) in an Indian Tribe, including a river-bed or water-rights, see Winters v. United States, 207 U. S. 564; S 28:207; L 52:340; Donnelly v. United States, 228 U. S. 243; S 33:449; L 57:820; 228 U. S. 708; S 33:1024; L 57:1035.

[8]Scott v. Lattig, 227 U. S. 229; S 33:242; L 57:490.

[9]United States v. Chandler-Dunbar Co., 209 U. S. 447; S 28:579; L 52:881.

[10]Pollard's Lessee v. Hagan, cited above; Weber v. Harbor Comm'rs, 18 Wall. 57; L 21:798; Barney v. Keokuk, 94 U. S. 324; L 24:224; Packer v. Bird, cited above; Mobile Transp'n Co. v. Mobile, cited above; Scott v. Lattig, 227 U. S. 229; S 33:242; L 57:490; Producers Oil Co. v. Hanzen, 238 U. S. 325; S 35:755; L 59:1330.

[11]Eldridge v. Trezevant, 160 U. S. 452; S 16:345; L 40:490 (State reservation of right to build public levees); Water Power Co. v. Water Comm'rs, 168 U. S. 349; S 18:157; L 42:497 (State grant of an easement); Railway v. Renwick, 102 U. S. 180; L 26:51: (State grant or license of right to build upon State-owned submerged land; subsequent State grant, to a railroad of Eminent Domain right, subject to condition of payment to such original licensee or grantee the value of his structure: such owner having no absolute title thereto,

§ 487. The Common Law Public Navigation Easement, as Matter of Property (Title).[12]

1. One of the Federally adopted Common Law particulars of land title law is that of existence, in the individual members of the public, severally, of an easement of navigation, in navigable waters.[13]

2. This principle is frequently expressed in the saying that navigable natural water-areas are natural highways. The easement includes the right of the public—acting through the United States, or through a State, as the case may be, as Parens Patriae—to improve natural waterways for greater convenience of navigation: the existence of such particular aspect of the general (navigation) easement being shown by the absence, in such situation, of right of compensation, in favor of private owners whose property is physically interfered with. [14]

3. The navigation easement is operative, by way of Incident, upon, and as against, (a) non-navigable upper reaches of a navigable stream, to the extent of inhibition within certain limits, of diversion of water, for irrigation or for other like objects,—in so far as such diversion tends to diminish the natural navigability of the lower reaches;[15] and (b)

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but the structure being removable by the United States, at its pleasure).

[12]The easement in question, it will be borne in mind, is a matter of title in the individual members of the public, and is independent of the matter of distribution of Sovereignty as between the United States and the States, severally, (as, under the Federal Admiralty and Commerce powers) in respect of intra-State waters; but operates indifferently, in Federal or in State action, as negatory, (as far as the easement goes), of right of compensation for physical injury to private property-res, by (Federal or State, as the case may be) enforcement of the easement: e. g.: by improvement of a channel (as in the cases cited below).

[13]West Chicago R. R. v. Chicago, 201 U. S. 506; S 26:518; L 50:845; Hannibal Bridge Co. v. United States, 221 U. S. 194; S 31:603; L 55:699; United States v. Chandler-Dunbar Co., 229 U. S. 53; S 33:667; L 57:1063; Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82; S 33:679; L 57:1083; other cases, generally, cited below in this Chapter.

[14]Cases above cited. See South Carolina v. Georgia, 93 U. S. 4; L 23:782.

[15]United States v. Rio Grande Irrig'n Co., 174 U. S. 690; S 19:770; L 43:1136.

(within certain limits) riparian lands, to the extent of flooding, cutting off access to the water, or otherwise making use of such lands for improvement.[16]

4. Such right of improvement includes a right of public toll-charge, towards payment of the cost of construction, or of maintenance, of the improvement;[17] or of capitalization and use, to the same end, of surplus water-power created by an improvement.[18]

5. The navigation easement is, by its nature, of no higher plane than, but is of the same character as, the public easement in a highway (surface, overhead, or subterranean) on, over, or through, land proper. As between the navigation easement, therefore, and such land-highway easement, a necessity of adjustment exists; and particulars of inter-adjustment may be fixed by law.[19]

6. While the navigation easement is dominant over private title in general, it is—like all other property-right—subject to the occasions of Public Policy (State or Federal, as the case may be): as, to requirements of public health.[20]

7. It is perhaps not possible to define with certainty the

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[16]Gibson v. United States, 166 U. S. 269; S 17:578; L 41:996; Scranton v. Wheeler, 179 U. S. 141; S 21:48; L 45:126; Bedford v. United States, 192 U. S. 217; S 24:238; L 48:414; Jackson v. United States, 230 U. S. 1; S 33:1011; L 57:1363; Hughes v. United States, 230 U. S. 24; S 33:1019; L 57:1374; Cubbins v. Mississippi River Comm., 241 U. S. 351; S 36:671; L 60:1041.

As to areal limits of such easement over riparian lands, see United States v. Lynah, 188 U. S. 445; S 23:349; L 47:539: in which flooding of riparian lands was held to amount, in degree, to a "taking" of the land.

[17]Huse v. Glover, 119 U. S. 543; S 7:313; L 30:487; Sands v. Manistee River Co., 123 U. S. 288; S 8:113; L 31:149; Lindsay & Phelps Co. v. Mullen, 176 U. S. 126; S 20:325; L 44:400.

[18]Kaukauna Co. v. Green Bay Canal, 142 U. S. 254; S 12:173; L 35:1004.

[19]Gilman v. Philadelphia, 3 Wall. 713; L 18:96; Transportation Co. v. Chicago, 99 U. S. 635; L 25:336; Escanaba Co. v. Chicago, 107 U. S. 678; S 2:185; L 27:442; Miller v. New York, 109 U. S. 385; S 3:228; L 27:971; Cardwell v. American Bridge Co., 113 U. S. 205; S 5:423; L 28:959; Hamilton v. Vicksburg etc. R. R., 119 U. S. 280; S 7:206; L 30:393; Willamette Bridge v. Hatch, 125 U. S. 1; S 8:811; L 31:629; Lake Shore etc. Ry. v. Ohio, 165 U. S. 365; S 17:357; L 41:747.

[20]Wilson v. Blackbird Creek Co., 2 Pet. 245; L 7:412; Pound v. Turck, 95 U. S. 459; L 24:525; Manigault v. Springs, 199 U. S.

term "navigable" (water area) for the purposes of navigation-easement. Physical conditions in Great Britain and in this country are so different, that there is practically a complete absence of English authority on the subject. We may assume, (and the cases cited seem to show) that the Common Law navigation easement exists over all such natural waters as are navigable within the Federal Admiralty definition. There are, however, in this country, natural bodies of water not sufficiently important, it would seem, to be within that definition, but, nevertheless, of some practical navigability. Such waters, we may suggest, are to be considered as subject to the easement.[21]

8. In the case of a non-navigable body of water, wholly within a State, rights of the public and of a private individual, respectively, are matter of exclusive State concern.[22]

§ 488. Subterranean Waters.

Subterranean water is part and parcel of the land, and is property-res; and the principle applies to ordinary forms of collection of it, as in a well.[23]

In so far as, in the case of such waters, there enters the element of flow, (ordinarily by percolation), the principles, considered elsewhere, dealing with surface water-areas, are applicable, mutatis mutandis.[24]

§ 489. Riparian Rights.

What has been said above in general terms, is true of riparian rights, as such.[25]

473; S 26:127; L 50:274; Chicago, B. & Q. Ry. v. Drainage Comm'rs, 200 U. S. 561; S 26:341; L 50:596.

For a case of waiver by Congress, of the navigation easement, and voluntary recognition as property (as entitled to compensation) of structures subject to the navigation easement, see Monongahela Nav. Co. v. United States, 148 U. S. 312; S 13:622; L 37:463.

[21]See a certain degree of discussion of the subject in Packer v. Bird, 137 U. S. 661; S 11:210; L 34:819.

[22]Illinois v. Economy Power Co., 234 U. S. 497; S 34:973; L 58:1429.

[23]United States v. Alexander, 148 U. S. 186; S 13:529; L 37:415 (the drying of a well, in land adjoining a parcel taken under Eminent Domain, held an informal "taking" of the water-right in the well).

[24]Case last cited. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61; S 31:337; L 55:369: (imposition of limitations upon use of Saratoga mineral springs).

[25]Norton v. Whiteside, 239 U. S. 144; S 36:97; L 60:186: (State power over such rights, as matter of land-title).

PART III.

THE FEDERAL CONCEPTION AND DEFINITION OF LIBERTY.

CHAPTER LXXVII.

Bodily Liberty.

§ 490. Qualifications of General Character.

In respect of bodily liberty, as protected by the Due Process-Liberty clauses of the Fifth and Fourteenth Amendments, respectively, the qualification (in each of those Amendments): "without due process of law" recognizes, adopts, and yields to, limitations (a) existing at the Common Law or (b) generically within the Common Law conception of the proper outer limits of personal liberty: as, permissible imprisonment for debt;[1] imprisonment under Criminal Procedure; commitment for Contempt; compulsory service of seamen under shipping-articles;[2] custody of infants;[3] compulsory labor upon highways;[4] and compulsory vaccination.[5]

§ 491. Slavery, Peonage, and the Like.

Within the class of qualifications above referred to, were, prior to the Thirteenth Amendment, slavery, holding in peonage, and the like:—as appears from the fact that, prior to that Amendment, the Due Process-Liberty clause of the Fifth Amendment (operative as against Federal action), did not inhibit maintenance (by Federal law), in Federal area, (as, the District of Columbia), of the institution of slavery.[6]

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[1]Simms v. Slacum, 3 Cr. 300; L 2:446; Palmer v. Allen, 7 Cr. 550; L 3:436; United States v. Knight, 14 Pet. 301; L 10:465; McNutt v. Bland, 2 How. 9; L 11:159.

[2]Robertson v. Baldwin, 165 U. S. 275; S 17:326; L 41:715; Dallemagne v. Moisan, 197 U. S. 169; S 25:422; L 49:709.

[3]New York Foundling Hospital v. Gatti, 203 U. S. 429; S 27:53; L 51:254. See Burrus, In re, 136 U. S. 586; S 10:850; L 34:500.

[4]Butler v. Perry, 240 U. S. 328; S 36:258; L 60:672.

[5]Jacobson v. Massachusetts, 197 U. S. 11; S 25:358; L 49:643.

[6]As to operation of the Thirteenth Amendment, see §§ 24, 25.

CHAPTER LXXVIII.

Liberty of Contract.

§ 492. Federal Nationalization of the Field.

Adopting the Common Law conception of Liberty, the Fifth Amendment, in the Federal field of action, and the Fourteenth Amendment, in the State field, by their Liberty texts, recognize and assure (with other forms of liberty) liberty of making contracts.

The field of Liberty of Contract being thus nationalized, it is not competent to a State to localize the matter, as, by inhibiting its citizens (a) from making contracts outside the State; or (b) from doing within the State acts preliminary to, and tending to, extra-State contracts.[1]

§ 493. Actual or Potential Qualification by Public Policy.[2]

Liberty, in the field of Contract, is limited by, or is subject to limitation by, Public Policy (Federal or State, as the case may be).[3]

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[1]Allgeyer v. Louisiana, 165 U. S. 578; S 17:427; L 41:832. A State statute forbade the doing of any act within the State involving or tending to the effect of fixing insurance upon property within the State, with foreign corporations not admitted to the State. The plaintiff in error—a citizen of the State, and there physically present—there wrote and mailed a letter to such an insurance company, in its home State, the operation of which was, as matter of contract law, to attach a pending open policy to certain goods within the former State. The statute was held void, as in conflict with liberty (in this case liberty of contract) guaranteed by the Fourteenth Amendment. It will be observed that it was the right of the insured (not that of the insurer) to make contracts, that was in question,—since the Liberty clause of the Fourteenth Amendment does not apply to corporations.

So, Bedford v. Eastern Bldg. & Loan Assoc'n, 181 U. S. 227; S 21: 597; L 45:834; New York L. Ins. Co. v. Head, 234 U. S. 149; S 34: 879; L 58:1259.

It will be observed that in the present section we are speaking solely from the standpoint of locus faciendi of a contract. As to other standpoints, see the following sections.

[2]As to the general principle, see §§ 431-434.

[3]Holden v. Hardy, 169 U. S. 366; S 18:383; L 43:780; (valid State eight-hour day law, for miners);

Lochner v. New York, 198 U. S. 45; S 25:539; L 49:937 (a State

§ 494. Liberty to Refrain from Contract.

One is as free to refrain from contract, as to make contracts; and is, therefore, at liberty to impose, at his pleasure, conditions of entering into a contract.[4]

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statutory limitation of bakery employees to sixty hours a week, viewed as beyond the proper scope of State Public Policy in limitation of liberty of Contract);

Riley v. Massachusetts, 232 U. S. 671; S 34:469; L 58:788 (valid State Women's Factory Labor Act);

Atkin v. Kansas, 191 U. S. 207; S 24:124; L 48:148 (contractors for municipal work may be interdicted, under penalty, from employing labor except by an eight-hour day);

Lieberman v. Van De Carr, 199 U. S. 552; S 26:144; L 50:305 (valid State requirement of license for sale of milk);

Northwestern L. Ins. Co. v. Riggs, 203 U. S. 243; S 27:126; L 51:168 (statutory inhibition of provision in life insurance of defence of misrepresentation, after one year, even if fraudulent, if the misrepresentation did not contribute to the event on which the policy becomes payable);

Whitfield v. Ætna L. Ins. Co., 205 U. S. 489; S 27:578; L 51:895, (valid State statutory inhibition of excepting from the benefit of life insurance, the situation of suicide not originally contemplated);

McLean v. Arkansas, 211 U. S. 539; S 29:206; L 53:315 (a State, for the fixing of miners' wages, may require measurement in the rough,—i. e., before screening);

Chicago, B. & Q. R. R. v. McGuire, 219 U. S. 549; S 31:359; L 55:328 (valid State statutory contractual incapacity of railroad employees in respect of damages in future tort);

Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373; S 31:376; L 55:502 (Sherman Act: prohibition of anti-cut rate contracts);

United States v. Lehigh Valley R. R., 220 U. S., 257; S 31:387; L 55:458 (a corporation, owner of goods, may be forbidden to contract with a carrier corporation, if under "control" of the latter: "Commodities Act");

Mutual Loan Co. v. Martell, 222 U. S. 225; S 32:74; L 56:175 (valid requirement of record, and of assent, of wife and employer, to assignment of wages);

Schmidinger v. Chicago, 226 U. S. 578; S 33:182; L 57:364 (valid fixing by law of weight of loaves of bread, as a condition of sale);

Rast v. Van Deman & Lewis, 240 U. S. 342; S 36:370; L 60:679; valid State taxation (and thereby practical prohibition) of use of trading-stamps and the like, in intra-State sales of goods.

So, Tanner v. Little, 240 U. S. 369; S 36:379; L 60:691; Pitney v. Washington, 240 U. S. 387; S 36:385; L 60:703;

Mugler v. Kansas, 123 U. S. 623; S 8:273; L. 31:205 (intoxicating liquors).

[4] E. g., a condition, by a proposing employer, of non-membership of a proposing employee, in a Labor Union. Coppage v. Kansas, 236 U. S. 1; S 35:240; L 59:441.

§ 495. Liberty of Terminating a Contract Relation.

Akin, in most respects, to the liberty of making contracts, is the liberty of either party to a continuing contract, to terminate it in accordance with its terms, (as in the case of the relation of master and servant, without a fixed term of employment). In this type of situation, liberty of termination is (subject to highly exceptional conditions referred to below) viewed as absolute, and as not being subject to considerations of Public Policy.[5]

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[5]Adair v. United States, 208 U. S. 161; S 28:277; L 52:436 (invalidity of an Act of Congress penalizing the discharge of a railroad employee because of his membership in a Labor Union. For the considerations to the contrary, see the dissenting Opinion).

CHAPTER LXXIX.

Liberty of Choice of Occupation.

§ 496.

What has been said above of Liberty of Contract, bears closely upon, and is applicable, mutatis mutandis, to liberty of choice, and of pursuit, of occupation.[1]

An example of public action going beyond the proper limits in this field, of Public Policy, is presented in an attempted State limitation of the occupation of freight-train conductor to persons of two years' experience as such conductor or as brakeman: the distinction not presenting, in the view of the Federal law, a fair and sound classification.[2]

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[1]Slaughter-House Cases, 16 Wall. 36; L 21:394; (valid limitation of slaughtering, in a densely populated area, to a public abattoir, open to all);

Bradwell v. State, 16 Wall. 130; L 21:442 (a State may limit the occupation of attorney-at-law, to men);

Miller v. Ammon, 145 U. S. 421; S 12:884; L 36:759; Gray v. Connecticut, 159 U. S. 74; S 15:985; L 40:80; Cronin v. Adams, 192 U. S. 108; S 24:219; L 48:365; Lloyd v. Dollison, 194 U. S. 445; S 24:703; L 48:1062 (power of forbidding or of limiting, by law, the occupation of manufacturing or of vending of alcoholic liquors);

Reetz v. Michigan, 188 U. S. 505; S 23:390; L 47:563 (regulation and limitation of practice of medicine);

Fischer v. St. Louis, 194 U. S. 361; S 24:673; L 48:1018 (valid municipal inhibition of keeping of cows, within closely populated areas);

Donovan v. Pennsylvania Co., 199 U. S. 278; L 50:192; (valid prohibition, by State Unwritten law, of hackmen congregating at railroad stations, to the obstruction and inconvenience of railroad passengers);

Wilmington Min'g Co. v. Fulton, 205 U. S. 60; S 27:412; L 51:708 (valid State limitation of the higher grades of coal-mining to persons of publicly ascertained qualifications);

Hadacheck v. Los Angeles, 239 U. S. 394; S 36:143; L 43:348; (exclusion of brick-making from a certain section of a city; valid even as against an owner of clay land there situate);

Brazee v. Michigan, 241 U. S. 340; S 36:561; L 60:1034, (employment agencies prohibited from sending applicants to employers not requesting such action).

[2]Smith v. Texas, 233 U. S. 630; S 34:681; L 58:1129.

PART IV.

EQUAL PROTECTION OF THE LAWS: (AS GUARANTEED IN TERMS, BY THE FOURTEENTH, AND IN LEGAL EFFECT, BY THE FIFTH, AMENDMENT).

CHAPTER LXXX.

THE GENERAL CONCEPTION OF EQUALITY BEFORE THE LAW: EQUAL PROTECTION OF THE LAWS.[1]

§ 497. The Federal Conception of Equality before The Law.

1. The Federal Organic law adopts the Common Law conception and definition of Equality before the law. In that conception and definition, Equality before the law consists: not (a) in like and uniform treatment of all persons or things, but merely (b) in like and uniform treatment of all persons or things within a class reasonably selected and established: with the corollary of permissive classification (and of class differentiation) based upon fairness, reason, and sound Public Policy.

The question of Equality before the law resolves itself, as a practical matter, into a question of particulars of proper classification.[2]

2. Such permissive classification and class differentiation proceed according to areal political jurisdiction.

Thus (a) in Congressional action of general intra-State character, a classification is to extend to (but only to) the aggregate of State area; (b) in Congressional action dealing with the realm as a whole (intra-State and extra-State) classification is to extend to the realm as a whole; (c) in Congressional action dealing with a particular portion of

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[1]Fifth Amendment (operative against Federal action):—

* * * nor be deprived of life, liberty, or property, without due process of law; * * *

(As to the Equal Protection aspect of the Fifth Amendment, see §§ 425-430).

Fourteenth Amendment (operative against State action):—

* * * nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

As to "uniform" (duties, imposts and excises: Const. Art. I., § 8), and as to the generic equivalence of the term "uniform" in the Tax text, and the term "equal" in the Equal Protection sense, see § 359.

As to "special" taxes, see § 372.

[2]See two next succeeding chapters.

Federal area as a political subdivision, a classification is to extend to (but only to) such portion of Federal area;[3] (d) in action of general character, of a self-governing Federal State, a classification is to extend to (and only to) such Federal State as a whole; (e) in State action of general character, the classification is to extend to the State as a whole; (f) in State action of local character, a classification is to extend to a locality in question, as a whole; (g) in action of general character, of a municipal corporation, or the like, (Federal or State), a classification is to extend to the capacity of such municipal corporation or the like; and so forth: the underlying question of proper political subdivision, for this purpose being itself a question of Equal Protection of the Laws, and thus within Federal control.[4]

3. The Federal power of such control is vested primarily and presumptively in the Federal Judicial Branch, but is subject to a certain degree of qualification by the Federal conception, definition, and principles of Political law.[5]

4. Corporations, being mere creatures of law, obviously cannot fall within the scope of the Federal Organic requirement of Equality, in the same sense in which natural persons are within it. Such corporations are, however, within that requirement in so far as is consistent with their nature, and with the particulars of creation and existence of different instances or classes of such corporations.[6]

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[3] § 40.

[4] See two next succeeding chapters.

[5] See that head.

As to the principles and the limits of Federal Judicial deference, in this field, to Federal and to State Legislative views of Public Policy (Federal or State), see §§431-434.

See also Republican Form of Government.

[6] Southern Ry. v. Greene, 216 U. S. 400; S 30:287; L 54:536; other corporation cases cited throughout the present Part.

CHAPTER LXXXI.

Permissible Classification and Differentiation.

§ 498. This Branch of the Subject, Generally.

Judicially recognized sound and valid bases of classification and differentiation are presented below.

The Due Process clause of the Fifth Amendment (operative upon Federal action) and the Due Process clause of the Fourteenth Amendment (operative upon State action) being, in their respective fields (Federal and State) of one and the same legal effect,[1] in respect of the field in question, a decision based upon either one of these two texts is pertinent to, and is authoritative upon, the other text; and cases are, therefore, cited below, indifferently, upon whichever of the two texts arising. For convenience, however, the two classes of cases are, either in terms, or by necessary inference, differentiated.[2]

From the standpoint of practical convenience applications of the principles stated in the preceding section may be presented as follows:[3]

1]*Federal Adoption of State Law Distributively:

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[1]§ 427.

[2]Thus, a case cited as dealing with "Congressional" or "Federal" or "Territorial" legislation, or with legislation of a particular Federal State (as the "District of Columbia" or "Hawaii") is a case upon the Fifth Amendment.

So, conversely, cases of "State" law, and of those cases cited in which a particular State is a party named, are upon the Fourteenth Amendment.

Cases not thus textually differentiated, are upon the Fourteenth Amendment.

For cases to the same effect, but within and based upon the "uniform" Tax text of the Constitution, see § 359.

[3]It will be observed that the sentence here begun continues through the remainder of the section, notwithstanding the approximation to Tabular form.

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*Dark-faced numerals are inserted merely for convenience of reference.

WITH THE RESULT OF ABSENCE OF UNIFORMITY IN STATE AREA AS A WHOLE;[4]

2] PERMISSIBLE STATE VARIATION ACCORDING TO SCOPE OF STATE POWER;[5]

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[4]Congressional Adoption of State Common Law Judicial Procedure. Wayman v. Southard, 10 Wh. 1; L 6:253; and later cases (§§ 746-752).

Congressional Adoption, in land pre-emption laws, of State definition of "heirs". Hutchinson Investment Co. v. Caldwell, 152 U. S. 65; S 14:504; L 38:356. So in Congressional Employers' Liability legislation. Seaboard Air Line v. Kenney, 240 U. S. 489; S 36:458; L 60:762.

Congressional Adoption, for intra-State areas, of features of the State Criminal law: as, of form and extent of punishment. Ex parte Yarbrough, 110 U. S. 651; S 4:152; L 28:274; United States v. Waddell, 112 U. S. 76; S 5:35; L 28:673; Motes v. United States, 178 U. S. 458; S 20:993; L 44:1150; Rakes v. United States, 212 U. S. 55; S 29:244; L 53:401; United States v. Mason, 213 U. S. 115; S 29:480; L 53:725; United States v. Press Pub'g Co., 219 U. S. 1; S 31:212; L 55:65.

See also Wilson Act; Webb Act (§ 406).

[5]Aberdeen Bank v. Chehalis County, 166 U. S. 440; S 17:629; L 41:1069; Merchants' Bank v. Pennsylvania, 167 U. S. 461; S 17:829; L 42:236; Citizens' Bank v. Kentucky, 217 U. S. 443; S 30:532; L 54:832; Clement Bank v. Vermont, 231 U. S. 120; S 34:31; L 58:147; (permissible State tax specialization in respect of national banks).

Travellers' Ins. Co. v. Connecticut, 185 U. S. 364; S 22:673; L 64:949; (a State may, in taxation, classify separately (a) resident and (b) non-resident holders of shares of stock of a domestic corporation of the State).

Kidd v. Alabama, 188 U. S. 730; S 23:401; L 47:669 (a State, taxing the property of domestic and of foreign railroads doing business in the State, but not their stock, may tax intrastate-owned stock of other railroads which latter it cannot otherwise effectually tax).

Beers v. Glynn, 211 U. S. 477; S 29:186; L 53:290 (State succession taxation of personalty of non-resident decedents who had owned realty in the State, but not personalty of other non-resident decedents).

Thompson v. Kentucky, 209 U. S. 340; S 28:533; L 52:822: a State, in taxing spirits, in a United States bonded warehouse (see § 130) subject to the Federal lien and Federal possession, may, by reason of, and to the extent of, Federal limitation of the State power over such property, make such spirits a separate class.

Brown-Forman Co. v. Kentucky, 217 U. S. 563; S 30:578; L 54:883 (a State license tax upon the occupation of manufacture of blended spirits is not invalid although non-resident manufacturers are

3] PERMISSIBLE VARIATION BY LOCALITY OR BY LOCAL CONSIDERATIONS;[6]

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thereby made, in effect, favored competitors with the taxed class, by force of the Federal Intercommerce law).

Griffith v. Connecticut, 218 U. S. 563; S 31:132; L 54:1151: State usury legislation applicable to State banks but (owing to State incapacity) not to national banks.

Abilene Bank v. Dolley, 228 U. S. 1; S 33:409; L 57:707; State depositors' guaranty Act not invalidated by (necessary) omission of national banks.

[6]Natal v. Louisiana, 139 U. S. 621; S 11:636; L 35:288 (exclusion of private markets from a certain area within a populous city). So of manufacturing establishments, emitting smoke. Northwestern Laundry v. Des Moines, 239 U. S. 486; S 36:206; L 60:396.

Columbus Ry. v. Wright, 151 U. S. 470; S 14:396; L 38:238 (State allotment, for taxation, of the non-localized chattel property of a railroad among the counties traversed, although with the result of non-uniformity of rate, according to differences in county rates).

Erb v. Morasch, 177 U. S. 584; S 20:819; L 44:897 (low-speed provision for only one of certain street-railroads in a city).

Williams v. Fears, 179 U. S. 270; S 21:128; L 45:186 (State license-tax upon employment agencies for laborers for work out of the State).

Foster v. Pryor, 189 U. S. 325; S 23:549; L 47:835 (Territorial Tax Act, with different rates for different sections, as, organized and unorganized, areas).

Field v. Barber Asphalt Co., 194 U. S. 618; S 24:784; L 48:1142 (special paving assessment: veto power of adjacent owners limited to resident owners).

Bacon v. Walker, 204 U. S. 311; S 27:289; L 51:499; (State prohibition of grazing of sheep on public lands, within two miles of privately owned lands).

Toyota v. Hawaii, 226 U. S. 184; S 33:47; L 57:180 (variation of license-fees, as among different localities).

Kentucky Union Co. v. Kentucky, 219 U. S. 140; S 31:171; L 55:137 (State tax applicable, in fact, only to part of State, of peculiar conditions).

Adams v. Milwaukee, 228 U. S. 572; S 33:610; L 57:971 (classification for regulation, of vendors of milk, by source of milk, as within, or as outside of, a city in question).

Giozza v. Tiernan, 148 U. S. 657; S 13:721; L 37:599; Lloyd v. Dollison, 194 U. S. 445; S 24:703; L 48:1062; Rippey v. Texas, 193 U. S. 504; S 24:516; L 48:767; Eberle v. Michigan, 232 U. S. 700; S 34:464; L 58:803 (local option: alcoholic liquors).

Asbell v. Kansas, 209 U. S. 251; S 28:485; L 52:778 (State statute providing, in absence of Federal law and action to the contrary, for State inspection of cattle coming from other States, and for penalty;

4] PERMISSIBLE DIFFERENTIATION BETWEEN AMERICAN-BORN, AND FOREIGN-BORN, ALIENS;[7]

5] PERMISSIBLE DIFFERENTIATION AS BETWEEN RESIDENTS AND NON-RESIDENTS;[8]

6] PERMISSIBLE DIFFERENTIATION BY RACE OR COLOR;[9]

7] PERMISSIBLE VARIATION, ACCORDING TO AGE, OR SEX, STUDENTSHIP, AND THE LIKE;[10]

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with distinction, based upon actual conditions, between States north and States south, of the State in question).

Hadacheck v. Los Angeles, 239 U. S. 394; S 36:143; L 60:348 (exclusion of brick-making, from a certain section of a city).

[7]Patsone v. Pennsylvania, 232 U. S. 138; S 34:281; L 58:539 (Foreign-born, but not other, aliens, prohibited from carrying fire-arms).

[8]District of Columbia v. Brooke, 214 U. S. 138; S 29:560; L 53:941: (statutory drainage system: Criminal proceedings against resident owners; Civil proceedings against non-resident owners, for violation or noncompliance).

[9]Louisville, N. O. & Tex. Ry. v. Mississippi, 133 U. S. 587; S 10:348; L 33:784; Plessy v. Ferguson, 163 U. S. 537; S 16:1138; L 41:256; Chesapeake & O. Ry. v. Kentucky, 179 U. S. 388; S 21:101; L 45:244; (State power of requiring race separation in public vehicles in intrastate traffic).

Berea College v. Kentucky, 211 U. S. 45; S 29:33; L 53:81 (State power of race separation in incorporated educational institutions within the power, in general, of the State).

So, also, race separation in the public schools of the District of Columbia.

[10]Interstate Ry. v. Massachusetts, 207 U. S. 79; S 28:26; L 52:111 (State statute; half-fare for children attending public school. Other aspects of this case are presented elsewhere).

Muller v. Oregon, 208 U. S. 412; S 28:324; L 52:551; (State statute forbidding employment of a female in a laundry more than ten hours in any one day).

Sturges & Burn v. Beauchamp, 231 U. S. 320; S 34:60; L 58:245 (child-labor legislation).

Miller v. Wilson, 236 U. S. 373; S 35:342; L 59:628 (female hotel servants).

Bosley v. McLaughlin, 236 U. S. 385; S 35:345; L 59:632 (female graduate nurses, employed in hospitals).

Waugh v. University of Mississippi, 237 U. S. 589; S 35:720; L 59:1131 (students).

Minor v. Happersett, 21 Wall. 162; L 22:627 (the Fourteenth Amendment does not vest in women right of voting within a State, even in elections of direct Federal concern). See, as to this, Republican Form of Government.

8] PERMISSIBLE VARIATION ACCORDING TO PUBLIC, AS DISTINGUISHED FROM PRIVATE, USE;[11]

9] PERMISSIBLE VARIATION BY DOMESTIC RELATIONS;[12]

10] PERMISSIBLE VARIATION ACCORDING TO INDIVIDUAL REQUEST;[13]

11] PERMISSIBLE VARIATION ACCORDING TO REQUIREMENTS OF GOVERNMENTAL EFFICIENCY, GENERALLY;[14]

12] PERMISSIBLE VARIATION AND DIFFERENTIATION ACCORDING TO EVIDENTIAL REQUIREMENTS;[15]

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[11]Willcox v. Consolidated Gas Co., 212 U. S. 19; S 29:192; L 53:382 (a State statutory lower rate for gas for a municipal corporation than for private consumers, not, eo facto, violative of Equal Protection of the laws).

[12]Mutual Loan Co. v. Martell, 222 U. S. 225; S 32:74; L 56:175: (statutory requirement of wife's assent to an assignment of wages).

[13]Booth v. Indiana, 237 U. S. 391; S 35:617; L 59:1011; (statutory requirement, in the interest of mine-workers, conditioned upon request by a certain number of persons concerned).

[14]Williams v. Mississippi, 170 U. S. 213; S 18:583; L 42:1012; Rawlins v. Georgia, 201 U. S. 638; S 26:560; L 50:899; Lang v. New Jersey, 209 U. S. 467; S 28:594; L 52:894; (qualifications of jurors; excepted classes of individuals).

United States v. Union Pac. R. R., 98 U. S. 569; L 25:143; (specific Congressional provision in respect of a certain suit only).

United States v. Bitty, 208 U. S. 393; S 28:396; L 52:543; United States v. Heinze, 218 U. S. 532; S 31:98; L 54:1139 (right of appeal, by the United States, but not by defendant, from interlocutory decision upon demurrer to indictment).

Saranac Land Co. v. Comptroller of New York, 177 U. S. 318; S 20:642: L 44:786; (special Statute of Limitations for challenge of tax deed, from State, of wild lands).

Lang v. New Jersey, 209 U. S. 467; S 28:594; L 52:894 (right of challenge of grand juror, as over age, limitable to exclusion of persons committing crime after the impanelling of the grand jury).

[15]Silz v. Hesterberg, 211 U. S. 31; S 29:10; L 53:75 (State statute making Criminal the possession of game, during the local closed season —including game from another State; the classification rested upon the practical impossibility, or the extreme difficulty, of procuring evidence as to intra-State origin of the game).

Rosenthal v. New York, 226 U. S. 260; S 33:27; L 57:212 (prohibition to junk dealers of purchase of telegraph or telephone wire, or the like, except upon ascertainment of good title in the vendor).

McLean v. Denver & Rio Grande R. R., 203 U. S. 38; S 27:1; L 51:78; (Territorial legislation to protect branded range cattle, providing for inspection and tagging of cattle-hides sent out of the Territory, with fee of ten cents for each hide; and forbidding offering to rail-

13] PERMISSIBLE DIFFERENTIATION AS AGAINST CORPORATIONS;[16]

14] PERMISSIBLE INTER-CLASSIFICATION, IN GENERAL, OF CORPORATIONS;[17]

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road, or railroad's receiving, untagged hides for such extra-Territorial transport).

Mobile etc. R. R. v. Turnipseed, 219 U. S. 35; S 31:136; L 55:78; statutory (rebuttable) presumption, in tort, against railroad corporations, as to certain matters easily demonstrable by them.

Consolidated Rendering Co. v. Vermont, 207 U. S. 541; S 28:178; L 52:327; State statute providing for an order to produce papers, etc. in a Judicial proceeding, may validly be limited to corporations: for the reason that an individual may be subpœnaed duces tecum, while in the case of a corporation that form of procedure would often be unavailable, or, where theoretically available, ineffectual.

[16]Missouri Pac. Ry. v. Humes, 115 U. S. 512; S 6:110; L 29: 463; Minneapolis etc. Ry. v. Beckwith, 129 U. S. 26; S 9:207; L 32: 585; (double damages, in case of damage by non-fencing of railroad right of way).

Missouri Ry. v. Mackey, 127 U. S. 205; S 8:1161; L 32:107: (abolition, as to railroads, of fellow-servant doctrine).

Nashville etc. Ry. v. Alabama, 128 U. S. 96; S 9:28; L 32:352; (color-blind test for engineers etc. at railroads' expense).

Western Un. Tel. Co. v. Indiana, 165 U. S. 304; S 17:345; L 41: 725; (exceptional penalty upon telegraph corporations for non-payment of taxes).

Orient Ins. Co. v. Daggs, 172 U. S. 557; S 19:281; L 43:552; (burden of proof upon fire insurance corporations).

Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73; S 21:535; L 45: 755; (special rule of evidence for life-insurance corporations, as to admissibility in evidence of statements in application for life insurance).

Knoxville Iron Co. v. Harbison, 183 U. S. 13; S 22:1; L 46:55; Dayton Coal & Iron Co. v. Barton, 183 U. S. 23; S 22:5; L 46:61; (payment of wages in money, not in store orders, etc.).

Missouri, Ks. & Tex. Ry. v. May, 194 U. S. 267; S 24:638; L 48: 971; penalization of railroads for allowing noxious weeds to go to seed on the right-of-way.

Chicago, B. & Q. Ry. v. Drainage Comm'rs, 200 U. S. 561; S 26: 341; L 50:596; discrimination against railroads, as between them and ordinary highways, in respect of recompense, upon order of removal of (previously lawful) stream-obstructions.

Mallinckrodt Works v. St. Louis, 238 U. S. 41; S 35:671; L 59: 1192 (corporations required to file a statement of non-participation in pools and the like).

[17]Fidelity Mut. Life Ass'n v. Mettler, 185 U. S. 308; S 22:662; L 46:922 (different classes of Insurance Corporations); Keokee Coke

15] PERMISSIBLE DIFFERENTIATION BASED UPON PECULIAR CLASS PRIVILEGES;[18]

16] PERMISSIBLE VARIATION ACCORDING TO EXISTING, OR FUTURE, STATUS OR SITUATION;[19]

17] PERMISSIBLE DIFFERENTIATION, IN STATE SUCCESSION TAX, AS AMONG DIFFERENT CLASSES OF BENEFICIARIES, AND THE LIKE;[20]

18] PERMISSIBLE DIFFERENTIATION ACCORDING TO THE ELEMENT OF DANGER, OR OF DEGREE OF DANGER;[21]

Co. v. Taylor, 234 U. S. 224; S 34: 856; L 58: 1288; (classification of corporations as to payment of employees in store-orders).

Pullman Co. v. Knott, 235 U. S. 23; S 35: 2; L 59: 105.

Detroit, Ft. Wayne etc. Ry. v. Osborn, 189 U. S. 383; S 23: 540; L 47: 860 (street cars).

[18]Farmers' Bank v. Minnesota, 232 U. S. 516, (see pp. 529-531); S 34: 354; L 58: 706.

[19]Reetz v. Michigan, 188 U. S. 505; S 23: 390; L 47: 563 (medical registration).

Watson v. Maryland, 218 U. S. 173; S 30: 644; L 54: 987; (a physicians' registration act, exempting present practitioners).

Williams v. Walsh, 222 U. S. 415; S 32: 137; L 56: 253 (statutory regulation of sale of gun-powder, exempting existing contracts).

Waugh v. University of Mississippi, 237 U. S. 589; S 35: 720; L 59: 1131.

[20]Magoon v. Illinois Trust etc. Bank, 170 U. S. 283; S 18: 594; L 42: 1037; Plummer v. Coler, 178 U. S. 115; S 20: 829; L 44: 998; Campbell v. California, 200 U. S. 87; S 23: 272; L 47: 400; Billings v. Illinois, 188 U. S. 97; S 23: 272; L 47: 400; Jones v. Jones, 234 U. S. 615; S 34: 937; L 58: 1500.

As to Federal such taxation, see "Uniform" (§ 359).

[21]Chicago, Rock Island & Pac. Ry. v. Arkansas, 219 U. S. 453; S 31: 275; L 55: 290; (State statute limiting certain safety requirements to trains of five cars or more, and to railroads having fifty miles in the State). So, in effect, of full switching crew laws. St. Louis Iron Mtn. etc. Ry. v. Arkansas, 240 U. S. 518; S 36: 443; L 60: 776.

Chicago Dock Co. v. Fraley, 228 U. S. 680; S 33: 715; L 57: 1022 (exceptional statutory requirement of high enclosure for construction-elevators, in a building in process of construction).

Easterling Lumber Co. v. Pierce, 235 U. S. 380; S 35: 133; L 59: 279.

Miller v. Strahl, 239 U. S. 426; S 36: 147; L 60: 364; (requirement of night-watchman in hotel for protection of guests against fire).

19] PERMISSIBLE VARIATION ACCORDING TO DANGER FROM FRAUD;[22]

20] PERMISSIBLE CLASSIFICATION BY CLASS INCAPACITY OF SELF-PROTECTION;[23]

21] PERMISSIBLE VARIATION ACCORDING TO FORMS AND TYPES OF PROPERTY-RES, OR OF TITLE;[24]

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[22]Allen v. Riley, 203 U. S. 347; S 27:95; L 51:216; John Woods & Sons v. Carl, 203 U. S. 358; S 27:99; L 51:219; Ozan Lumber Co. v. Union County Bank, 207 U. S. 251; S 28:89; L 52:195; (statutory requirement of disclosure, by a promissory note, of patent-right, etc. consideration).

Heath & Milligan Co. v. Worst, 207 U. S. 338; S 28:114; L 52:236; (statutory requirement of disclosure of ingredients of ready-mixed paints).

Lemieux v. Young, 211 U. S. 489; S 29:174; L 53:295; Kidd, Dater Co. v. Musselman Grocer Co., 217 U. S. 461; S 30:606; L 54:839 ("Sales in Bulk" Acts).

Armour & Co. v. North Dakota, 240 U. S. 510; S 36:440; L 60:771 (requirement of certain net weights of lard sold in containers).

[23]International Harvester Co. v. Missouri, 234 U. S. 199; S 34:859; L 58:1276; (State anti-Trust statutes valid although not including combinations of employees).

Whitfield v. Ætna L. Ins. Co., 205 U. S. 489; S 27:578; L 51:895; (validity of State statute forbidding defence of suicide not originally contemplated).

Miller v. Strahl, 239 U. S. 426; S 36:147; L 60:364; (warning of hotel guests in case of fire at night).

Seaboard Air Line v. Seegers, 207 U. S. 73; S 28:28; L 52:108; (moderate penalty in damages, upon unsuccessful defence of suit upon a small claim against a railroad). So, Yazoo & Miss. R. R. v. Jackson Vinegar Co., 226 U. S. 217; S 33:40; L 57:193.

Missouri, Ks. & Tex. Ry. v. Cade, 233 U. S. 642; S 34:678; L 58:1135; Missouri, Ks. & Tex. Ry. v. Harris, 234 U. S. 412; S 34:790; L 58:1377; (differentiation, in respect of allowance of attorney's fee to plaintiff, between large and small claims: limitation to claims of a very small amount).

Atchison, T. & S. F. R. R. v. Matthews, 174 U. S. 96; S 19:609; L 43:909; (fires caused by railroad engines).

Farmers' etc. Ins. Co. v. Dobney, 189 U. S. 301; S 23: 565; L 47:821; (fire insurance).

Missouri Pac. Ry. v. Larabee, 234 U. S. 459; S 34:979; L 58:1398; (Mandamus, peremptory writ: attorney's fee).

See, also, the preceding subdivision.

[24]Morgan v. Louisiana, 118 U. S. 455; S 6:114; L 30:237; (ships, and other vessels: State quarantine tax).

Powell v. Pennsylvania, 127 U. S. 678; S 8:992; L 32:253; Capital City Dairy Co. v. Ohio, 183 U. S. 238; S 22:120; L 46:171; Ham-

22] PERMISSIBLE DIFFERENTIATION ACCORDING TO THE USE OF PROPERTY;[25]

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mond Packing Co. v. Montana, 233 U. S. 331; S 34:596; L 58:985; (oleomargarine).

Gundling v. Chicago, 177 U. S. 183; S 20:633; L 44:725; (cigarettes).

Otis v. Parker, 187 U. S. 606; S 23:168; L 47:323; (State prohibition of speculative dealings in corporate stock).

Kentucky R. R. Tax Cases, 115 U. S. 321; S 6:57; L 29:414; Michigan Centr. R. R. v. Powers, 201 U. S. 245; S 26:459; L 50: 744; (special dealing with railroad property in State taxation).

Giozzza v. Tiernan, 148 U. S. 657; S 13:721; L 37:599; (special State taxation of dealers in alcoholic liquors).

Brown-Forman Co. v. Kentucky, 217 U. S. 563; S 30:578; L 54: 883; (differentiation, for State occupation tax, between blended and non-blended spirits).

Sperry & Hutchinson Co. v. Rhodes, 220 U. S. 502; S 31:490; L 55:561; (photographs of private persons: State inhibition of publication of, for certain purposes).

Halter v. Nebraska, 205 U. S. 34; S 27:419; L 51:696 (forbidding use of the United States flag as advertisement, on merchandise, although not in printed advertisement).

Barrett v. Indiana, 229 U. S. 26; S 33:692; L 57:1050 (differentiation between different kinds of coal, in legislation as to width of passages in mines).

Metropolitan Ry. v. New York, 199 U. S. 1; S 25:705; L 50:65; Chesapeake & O. Ry. v. Conley, 230 U. S. 513; S 33:985; L 57:1597; (differentiation, in State statutory rate regulation, between steam railroads and electric street railroads: exemption of the latter class from the rate provision).

Montoya v. Gonzales, 232 U. S. 375; S 34:413; L 58:645; (differentiation, in a Territorial Statute of Limitations, between (a) Spanish, Mexican, and United States grants, and (b) other sources of title).

Cargill Co. v. Minnesota, 180 U. S. 452; S 21:423; L 45:619; (classification, for State elevator regulations, of elevators situated on railroad lands, and thereby having use and benefit of the railroad's franchise).

Atlantic Coast Line v. Georgia, 234 U. S. 280; S 34:829; L 58: 1312 (State engine head-light requirement may except tram-roads, logging-roads, etc.).

[25]Fifth Ave. Coach Co. v. New York, 221 U. S. 467; S 31:709; L 55:815; (statutory singling out of stage-coaches in a city for prohibition against exterior advertising signs).

Chicago Dock Co. v. Fraley, 228 U. S. 680; S 33:715; L 57:1022 (statutory singling out of construction-elevators, in buildings in the course of construction, for certain safety regulations).

23] PERMISSIBLE DIFFERENTIATION ACCORDING TO PERSONAL CHARACTER, CONDUCT, PAST RECORD, AND THE LIKE;[26]

24] PERMISSIBLE CLASSIFICATION OF PRISONERS, IN RESPECT OF FUTURE CRIMINAL LIABILITY AND PUNISHMENT;[27]

25] PERMISSIBLE DIFFERENTIATION ACCORDING TO STAGES OF PRODUCTION, OR OF OWNERSHIP, OF CHATTELS;[28]

26] PERMISSIBLE SPECIALIZATION AND DIFFERENTIATION ACCORDING TO FACE VALUE;[29]

27] PERMISSIBLE VARIATION AND DIFFERENTIATION ACCORDING TO OCCUPATION, MODE OF ACTIVITIES, ET CETERA;[30]

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[26]McDonald v. Massachusetts, 180 U. S. 311; S 21:389; L 45:542; (Habitual Criminals Act).

Hawker v. New York, 170 U. S. 189; S 18:573; L 42:1002; (past conviction of any felony, operating automatically to incapacitate for practice of medicine).

Ughbanks v. Armstrong, 208 U. S. 481; S 28:372; L 52:582; (State-prison parole law, providing for discrimination, as among prisoners, by good or bad conduct, etc.). So, Graham v. West Virginia, 224 U. S. 616; S 32: 583; L 56: 917.

Western Turf Association v. Greenberg, 204 U. S. 359; S 27:384; L 51:520; (a State statute annulling, pro tanto, the feature of mere "license", in the real-estate sense of the term, of tickets to places of amusement, and requiring actual admission of ticket-holders as a class, but making an exception adverse to persons of indecorous character).

[27]Finley v. California, 222 U. S. 28; S 32:13; L 56:75 (life-term prisoners, not other prisoners, subject to death penalty for assault with intent to kill, committed during imprisonment).

[28]Cox v. Texas, 202 U. S. 446; S 26:671; L 50:1099 (exemption, from a state liquor-sales law, of wine from home-raised grapes, while it is in the hands of the grower or the maker).

[29]Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232; S 10:533; L 33: 892; Hatch v. Reardon, 204 U. S. 152; S 27:188; L 51:415; (tax predicated by State law upon face value of corporation shares).

[30]Physicians: registration; Evidence of competency, etc.:

Dent v. West Virginia, 129 U. S. 114; S 9:231; L 32:623; Reetz v. Michigan, 188 U. S. 505; S 23:390; L 47:563; Watson v. Maryland, 218 U. S. 173; S 30:644; L 54:987; Collins v. Texas, 223 U. S. 288; S 32:286; L 56:439; (osteopathic practitioners).

Apothecaries:

Gray v. Connecticut, 159 U. S. 74; S 15:985; L 40:80; (prohibition of use of intoxicating liquors in prescription medicines).

Railroad Engineers: qualifications; color-blind tests, etc.:

Nashville etc. Ry. v. Alabama, 128 U. S. 96; S 9:28; L 32: 352.

Railroad Employees: as Exposed to Hazard:

Tullis v. Lake Erie & W. R. R., 175 U. S. 348; S 20:136; L 44:192; Louisville & Nashv. R. R. v. Melton, 218 U. S. 36; S 30:676; L 54:921; Mobile etc. R. R. v. Turnipseed, 219 U. S. 35; S 31:136; L 55:78; (abolition of fellow-servant rule); Chicago, B. & Q. R. R. v. McGuire, 219 U. S. 549; S 31:259; L 55:328; (inhibition of stipulations barring damage suits, in futuro).

Merchants:

American Steel & Wire Co. v. Speed, 192 U. S. 500; S 24:365; L 48:538; (State Merchants' license tax); Singer Sew. Mach. Co. v. Brickell, 233 U. S. 304; S 34:493; L 58:974; (differentiation, for state taxation and license, between settled merchants, and dealers selling through travelling agents).

Solicitors of Orders:

Delamater v. South Dakota, 205 U. S. 93; S 27:447; L 51:724; (liquors license requirement); Nutting v. Massachusetts, 183 U. S. 553; S 22:238; L 46:324; (fire insurance; absolute prohibition as to dealings with agents of non-admitted foreign companies).

Auctioneers:

Toyota v. Hawaii, 226 U. S. 184; S 33:47; L 57:180, (license fee).

Barbers:

Petit v. Minnesota, 177 U. S. 164; S 20:666; L 44:716; (State statute forbidding keeping open barber-shops on Sunday; while, as to other occupations, leaving open the question of necessity or charity as justification).

Bakers:

Schmidinger v. Chicago, 226 U. S. 578; S 33:182; L 57:364; (regulation as to loaves of bread).

Peddlers:

Baccus v. Louisiana, 232 U. S. 334; S 34:439; L 58:627 (prohibition of peddling of drugs, etc.).

Common Carriers:

Seaboard Air Line v. Seegers, 207 U. S. 73; S 28:28; L 52:108; (penalty of $50.00 on all common carriers, incorporated or not, for failing to settle claims within 40 days for loss or damage,—penalty recoverable only in action for damage, and not unless plaintiff recovers whole amount of his claim as presented to carrier).

Coal-Miners:

Wilmington Min'g Co. v. Fulton, 205 U. S. 60; S 27:412; L 51:708; (abolition of fellow-servant doctrine).

Other Occupations:

Hotel or lodging-house drummers (Williams v. Arkansas, 217 U. S. 79; S 30:493; L 54:673); laundry-men (Barbier v. Connolly, 113 U. S. 27; S 5:357; L 28:923; Soon Hing v. Crowley, 113 U. S. 703; S 5:730; L 28:1145); "Shylock" bankers (Bradley v. Richmond, 227 U. S. 477; S 33:318; L 57:603); unin-

28] PERMISSIBLE DIFFERENTIATION ACCORDING TO GOOD OR BAD CREDIT, OR THE LIKE;[31]

29] PERMISSIBLE DIFFERENTIATION ACCORDING TO AMOUNT, VALUE, NUMBERS, DENSITY OF POPULATION, EXTENT OF TIME, AND THE LIKE;[32]

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corporated money-lenders (Griffith v. Connecticut, 218 U. S. 563; S 31:132; L 54:1151; special usury laws).

Sub-Classes, in an Occupation or Activity:

American Sugar Ref'g Co. v. Louisiana, 179 U. S. 89; S 21: 43; L 45:102: a State license tax upon the occupation of refining sugar and molasses may exempt "planters and farmers grinding their own sugar and molasses * * * and planters who granulate syrup for other planters during the rolling season".

Martin v. Pittsburg etc. R. R., 203 U. S. 284; S 27:100; L 51: 184: a State may, by statute, provide that persons travelling on a passenger train, not as passengers, in the proper sense of the term, but by employment (not by the railroad, but connected with the train, e. g., postal-clerks) shall be subject, in respect of the liability of the railroad for negligence, to the same rules as employees of the railroad.

[31]Southwestern Tel. & Tel. Co. v. Danaher, 238 U. S. 482; S 35:886; L 59:1419 (permissible advance charges and refusal of service to delinquents, by a public service corporation).

[32]Morgan v. Louisiana, 118 U. S. 455; S 6:1114; L 30:237; Keeney v. New York, 222 U. S. 525; S 32:105; L 56:299; (graded taxation, etc.).

Hayes v. Missouri, 120 U. S. 68; S 7:350; L 30:578; a greater allowance of challenges to the Government, in large cities than elsewhere in the State.

Dow v. Beidelman, 125 U. S. 680; S 8:1028; L 31:841; (State classification of railroads by length of intrastate mileage, and grading rates of charge per mile according to classes).

Jones v. Brim, 165 U. S. 180; S 17:282; L 41:677; a State may make those liable for damage to a highway, who drive herds of cattle, horses, etc. (not single animals) over the highway, where it is constructed on a hillside. Validity of classification as between herds and single animals based upon the greater probability, in the case of herds, of tearing down the banks, etc.

Mason v. Missouri, 179 U. S. 328; S 21:125; L 45:214 (State classification of cities by population, for regulation of registration of voters).

New York v. Roberts, 171 U. S. 658; S 19:58; L 43:323; Reymann Brewing Co. v. Brister, 179 U. S. 445; S 21:201; L 45: 269; (State occupation tax on wholesale—not on retail—dealers in coal and mineral oils; State tax on business of sale of liquors; exemption of sales by producer in gallon lots).

Clark v. Titusville, 184 U. S. 329; S 22:382; L 46:569; (State tax,

for, and devoted exclusively to, quarantine expenses; graded by ships, barks, steamships, etc.).

Cincinnati Street Ry. v. Snell, 193 U. S. 30; S 24:319; L 48:604; (exceptional State provision for change of venue, at the instance of the opposing party, in a suit to which a corporation having a certain large number of shareholders, is a party).

Pope v. Williams, 193 U. S. 621; S 24:573; L 48:817; (State requirement of one year's declaration of residence and intent, from one newly coming into the State, as a condition of registration for voting).

St. Louis Coal Co. v. Illinois, 185 U. S. 203; S 22:616; L 46:872; McLean v. Arkansas, 211 U. S. 539; S 29:206; L 53: 315; (differentiation among coal-mines, for regulation, according to the number of miners employed).

Laurel Hill Cemetery Co. v. San Francisco, 216 U. S. 358; S 30: 301; L 54:515 (State municipal ordinance prohibiting, for the future, burial, within a certain densely-populated area).

Southwestern Oil Co. v. Texas, 217 U. S. 114; S 30:496; L 54: 688; (State differentiation of wholesale dealers in certain articles, in amount of corporation-tax).

Engel v. O'Malley, 219 U. S. 128; S 31:190; L 55:128 (State differentiation, for regulation, between large and small private banks, according to the average amounts of deposits: protection against small "wild-cat" banks).

Chicago, Rock Isl. & Pac. Ry. v. Arkansas, 219 U. S. 453; S 31: 275; L 55:290; differentiation, for safety requirements (a) between railroads above, and below, a certain mileage; and (b) between trains of five or more, and trains of less than five, cars.

St. Louis, Iron Mtn. etc. Ry. v. Arkansas, 240 U. S. 518; S 36: 443; L 60:775; full switching crews for railroads of over one hundred miles in length.

Reinman v. Little Rock, 237 U. S. 171; S 35:511; L 59:900; limitation as to livery stables in a city.

Chicago v. Sturges, 222 U. S. 313; S 32:92; L 56:215; State differentiation between greater and lesser municipal corporations, in respect of liability for mob damage. See also Municipal Corporations (§§ 420-424).

Quong Wing v. Kirkendall, 223 U. S. 59; S 32:192; L 56:350; (hand-laundry regulation: differentiation according to number of employees).

Metropolis Theatre Co. v. Chicago, 228 U. S. 61; S 33:441; L 57: 730; (theatre license-fees graded according to prices of admission of different theatres).

Citizens' Telephone Co. v. Fuller, 229 U. S. 322; S 33:833; L 57: 1206 (State differentiation for taxation between large and small telegraph and telephone corporations: exemption of corporations having gross receipts below a certain very small sum).

Chesapeake & O. Ry. v. Conley, 230 U. S. 513; S 33:985; L 57:

30] PERMISSIBLE VARIATION OR SPECIALIZATION BY EQUITABLE CONSIDERATIONS, OR BY ESTOPPEL;[33]

31] PERMISSIBLE STATE TAX EXEMPTIONS, BASED UPON CHARITABLE, OR OTHER LIKE CONSIDERATIONS.[34]

1597; (State differentiation in statutory rates according to length of railroads).

German Alliance Ins. Co. v. Kansas, 233 U. S. 389; S 34:612; L 58:1011; (differentiation, in statutory rate-regulation, between small and large insurance corporations; exemption, from legislation, of small farmers' mutual corporations).

Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571; S 35:167; L 59:364; (number of employees in a manufacturing establishment).

Miller v. Strahl, 239 U. S. 426; S 36:147; L 60:364; (night-watchman requirement upon hotels of more than forty rooms).

Northwestern Laundry v. Des Moines, 239 U. S. 486; S 36:206; L 60:396; (smoke nuisance in a city).

[33]Spencer v. Merchant, 125 U. S. 345; S 8:921; L 31:763; (where, of certain lots of land, dealt with by an invalid special assessment, some have in fact paid, the balance, in proper proportion, may be assessed by statute, on the other lots).

Alabama etc. Ry. v. Mississippi R. R. Comm., 203 U. S. 496; S 27:163; L 51:289: when, and as long as, a domestic railroad corporation maintains a certain (intrastate) rate for certain classes of shippers, the State may prescribe that rate for all other intrastate shippers.

[34]Board of Education v. Illinois, 203 U. S. 553; S 27:171; L 51:314.

As to Federal such exemption, see "Uniform" (§ 359).

CHAPTER LXXXII.

Invalid Classification.

§ 499. The Matter Generally.

Examples of classification violative of the principles set forth and illustrated in the two preceding sections, are as follows:

State legislation undertaking to classify citizens of a State by race or color, in respect of Public rights or duties;[1]

State legislation undertaking to discriminate between citizens of the United States and resident aliens, adverse to the latter, in respect of right to employ them, and of their right to employment;[2]

Mere pretended classification;[3]

Exception, from a State anti-monopoly, etc., Act, of agricultural produce and live stock, while in the hands of the producer or raiser;[4]

Arbitrary and unreasonable fixing of area for State special tax;[5]

Inequality, generally, in State taxation;[6]

Inequality in establishment of a class of individuals;[7]

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[1]Ex parte Virginia, 100 U. S. 339; L 25:676; Neal v. Delaware, 103 U. S. 370; L 26:567; Strauder v. West Virginia, 100 U. S. 303; L 25:664. See § 301.

[2]Truax v. Raich, 239 U. S. 33; S 36:7; L 60:131.

[3]Cotting v. Kansas City Stock Yards, 183 U. S. 79; S 22:30; L 46:92; (mere color of classification; only one in the class).

[4]Darnell & Son v. Memphis, 208 U. S. 113; S 28:247; L 52:413; See also, as to this case, § 102.

[5]Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 478; S 36:204; L 60:392; Gast Realty Co. v. Schneider, 240 U. S. 55; S 36:254; L 60:526.

[6]Raymond v. Chicago Traction Co., 207 U. S. 20; S 28:7; L 52:78.

[7]Smith v. Texas, 233 U. S. 630; S 34:681; L 58:1129; (unwarranted singling out freight conductors, as a class, for certain requirements for admission to the class); McFarland v. American Sugar Co., 241 U. S. 79; S 36:498; L 60:899; arbitrary classification (for a Monopoly etc. presumption adverse to them) of persons regularly paying less for sugar than they pay in other States.

Arbitrary singling-out of railroads for plaintiff's attorney's fee as costs.[8]

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[8]Gulf, Colorado & S. F. Ry. v. Ellis, 165 U. S. 150; S 17:255; L 41:666; Atchison, T. & S. F. Ry. v. Vosburg, 238 U. S. 56; S 35:675; L 59:1199. (As to permissible fields of such action, see Attorney's Fee).

For cases upon "special" taxes, see § 372.

PART V.

RIGHT IN AND TO EXISTING REMEDY (JUDICIAL, OR IN PAIS), AS AN INCIDENT, AND AS A FEATURE, OF PARTICULAR SUBSTANTIVE RIGHTS.

CHAPTER LXXXIII.

Existing Remedy as Matter of Private Right—General View.

§ 500. Subsidiary Character.—Grounds of Separate Treatment.

As matter of definition, Remedy, whether in pais or of Judicial character, is not capable of independent existence, but is capable of existence only as an Incident of, and as subsidiary to, some Substantive right: as, property right, or right to liberty of action in one or in another field. The subject before us might, therefore, have been treated distributively under various Substantive heads, as considered above. Most of the principles of the subject are, however, common to a number of, if not to all, those Substantive heads; and it will, therefore, be the most convenient course not to deal with the matter in a fragmentary way, under such different heads, but to treat it as a separate head—although a subsidiary head—by itself, with proper reference to such Substantive heads.

§ 501. The General Principle.

The general principle of the subject in question may be stated in general terms as follows: Where, and in so far as, the Federal Organic law protects a Substantive right, it protects, as a necessary Incident, Remedy existing at the inception of such right;[1] and, conversely, where a Substantive right is not protected by the Federal Organic law, Remedy is not so protected.[2]

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[1]Thus, Contract being Federally protected, a State cannot effectually provide for Insolvency Discharge from debts existing at the date of the Act, even as against its own citizens. Farmers' & Mechanics' Bank v. Smith, 6 Wh. 131; L 5:224.

[2]Existing statutory right of a private person to a penalty (to be recovered by a qui tam suit) is mere matter of public policy, not matter of inherent right, and may be withdrawn, by law, at pleasure and at any stage; and is not recognized and assured by Federal Organic law; and, in consequence, existing Remedy therefor (as, by qui tam action), is not recognized and protected by Federal Organic

§ 502. Remedy in Pais.

The conception of Remedy, for the purposes now in question, is not limited to Judicial Procedure, but extends to matter in pais, of Remedial character.[3]

The conception includes not merely broad and general features, but important particulars.[4]

§ 503. Limitation to the Beneficiary Party:—Potential Enlargement of Remedy.

1. GENERALLY.—Every Remedy has in view: (a) a beneficiary party, and (b) an opposing party. It is only such beneficiary party in whose favor existing Remedy is recognized and assured by Federal Organic law. Thus,—subject to two certain qualifications presented below[5]—in the case of any ordinary debt, it is only the creditor, not the debtor, who has, by Federal Organic law, right in the continuance, without change, of existing Judicial Procedure; and, as against the debtor, such Procedure may, in general, be changed, by law, at will.[6]

If there exists a class of liens upon land, but with no provision of law for Procedure of enforcement, such Procedure may be supplied.[7]

Where a State land-patent was to be issued upon completion of instalment payments, a statute provision for Executive forfeiture Procedure upon default in payments, but with option, to the purchaser, of Judicial resort in respect of the question of default, was a valid additional Remedy.[8]

So, pending a contract, a State may, without violation of Federal law, add Mandamus to existing other Remedy, even though there be thereby taken away right (assured by the

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law. Norris v. Crocker, 13 How. 429; L 14:210; Confiscation Cases, 7 Wall. 454; L 19:196.

So of a statutory right to reimbursement from a municipal corporation for damage caused by a mob. Louisiana v. New Orleans, 109 U. S. 285; S 3:211; L 27:936.

[3]For illustration, see succeeding sections.

[4]Ibid. [5]Par. 2 of the present section.

[6]Crawford v. Branch Bank, 7 How. 279; L 12:700; Easterling Lumber Co. v. Pierce, 235 U. S. 380; S 35:133; L 59:279.

[7]Livingston's Lessee v. Moore, 7 Pet. 469; L 8:751.

[8]Waggoner v. Flack, 188 U. S. 595; S 23:345; L 47:609. See also, as to this case, § 502, ad fin., and par. 3, below.

Organic law of the State in such existing Remedy) of jury trial.[9]

So, a new method of enforcement may be provided, for existing taxes.[10]

2. Statutes of Limitation:—As Against the Defendant Party.[11]—A period of Limitation, under an ordinary Statute of Limitation may, while it is still running, be lengthened as against the defendant party.[12]

Even after it has run, it may be opened, and the bar of the Statute removed, in respect of personal actions, not involving title to property, real or chattel.[13]

3. Reciprocal Positions:—Interchange of Positions.—In a given transaction or process, the positions of beneficiary party and opposing party are not necessarily fixed, for all stages, and all aspects, of the transaction or process; but are fixed, at each stage, in respect of each particular of the transaction or process. Thus, in a mortgage-foreclosure, the mortgagee is the beneficiary party in respect of general foreclosure Remedy; while the mortgagor is the beneficiary party in respect of existing right of redemption after foreclosure sale.[14]

§ 504. Qualificatory Features of Definition of the General Principle:—Permissible Scope of Modification of Existing Remedy.

The broad principle of the subject, as stated in the two preceding sections, is subject to certain qualificatory features of definition as follows:

(1) The period, actually running, of a Statute of Limi-

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[9]New Orleans City & Lake R. R. v. New Orleans, 157 U. S. 219; S 15:581; L 39:679.

[10]League v. Texas, 184 U. S. 156; S 22:475; L 46:478.

[11]As to the plaintiff party, see § 504.

[12]Campbell v. Holt, 115 U. S. 620; S 6:209; L 29:483; involving, a fortiori, the doctrine of the text.

[13]Campbell v. Holt, cited above.

As to Statutes of Limitation in general from the standpoint of title, and otherwise, see § 643.

[14]As in Brine v. Insurance Co., 96 U. S. 627; L 24:858.

In Waggoner v. Flack, (cited § 502, ad fin., and in par. 1 of the present section), the State was the beneficiary party in respect of protecting its title; while the purchaser was the beneficiary party in respect of his right of acquiring title.

tations, may be abridged, as against existing claims, provided a reasonable time for suit be allowed.[15]

(2) Existing claims may be subjected to set-off procedure;[16] to the establishment of a new form of tribunal;[17] or to change in form of suit without loss of effectiveness.[18]

(3) It is permissible to diminish an existing legal Remedy by subjecting it to principles of general Equity Jurisprudence, as Federally recognized: as, by granting to persons who are potential defendants in real actions, an Equitable defence, or an affirmative new procedure in which they may stand upon Equities.[19]

(4) A statute rate of interest from and after judgment, is—at least when exceptionally high—a matter of mere public policy and not of right; and such rate may, as against existing judgment creditors, be lowered.[20]

(5) The principle extends to the situation of a redemption period, after Judicial foreclosure sale;[21] to establishment, or enlargement, of a debtor's exemption as against

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[15]Hawkins v. Barney's Lessee, 5 Pet. 457; L 8:190; Sohn v. Waterson, 17 Wall. 596; L 21:737; Terry v. Tubman, 92 U. S. 156; L 23:537; Terry v. Anderson, 95 U. S. 628; L 24:365; Vance v. Vance, 108 U. S. 514; S 2:854; L 27:808; Mitchell v. Clark, 110 U. S. 633; S 4:170; L 28:279; Wheeler v. Jackson, 137 U. S. 245; S 11:76; L 34:659; Turner v. New York, 168 U. S. 90; S 18:38; L 42:392; Wilson v. Iseminger, 185 U. S. 55; S 22:573; L 46:804; Davis v. Mills, 194 U. S. 451; S 24:692; L 48:1067; Cunnius v. School District, 198 U. S. 458; S 25:721; L 49:1125; Kentucky Union Co. v. Kentucky, 219 U. S. 140; S 31:171; L 55:137; Blinn v. Nelson, 222 U. S. 1; S 32:1; L 56:65. So of abridgement of disseisin period. Soper v. Lawrence Bros., 201 U. S. 359; S 26:473; L 50:788.

[16]Blount v. Windley, 95 U. S. 173; L 24:424.

[17]Jackson v. Lamphire, 3 Pet. 280; L 7:679; Bronson v. Kinzie, 1 How. 311; L 11:143; Howard v. Bugbee, 24 How. 461; L 16:753; Barnitz v. Beverly, 163 U. S. 118; S 16:1042; L 41:93.

[18]Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437; S 23:234; L 47:249; Pittsburg Steel Co. v. Baltimore Soc'y, 226 U. S. 455; S 33; 167; L 57:297.

[19]Searl v. School District, 133 U. S. 553; S 10:374; L 33:740.

[20]Morley v. Lake Shore Ry., 146 U. S. 162; S 13:54; L 36:925.

[21]Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51; S 2:236; L 27:648.

execution, in general;[22] to abolition of imprisonment for debt;[23] or to change in the form of service of process.[24]

(6) It may be newly provided, as against existing tax-receivable written evidences of public indebtedness, that payment shall be provisionally made in money, with right of suit, in case of payment under protest, against the tax-collector.[25]

(7) It is permissible to require, by statute, the presenting for public record, within a fixed period, (inherently reasonable in length) of existing real-estate liens, previously valid without public record;[26] or the filing with the officials of a municipal corporation (as a necessary preliminary of Judicial—or of further Judicial—Procedure) of existing claims against the corporation,[27] even if already reduced to judgment;[28] or to require holders of inchoate tax-titles, subject to redemption, to give notice to occupants, if there are any, of land in question.[29]

(8) It is permissible to provide, in respect of existing tax titles, that in any action brought more than six months after the taking effect of the statute, a tax deed, recorded for two years or more, shall be conclusive of regularity in the assessment;[30] or, as against existing adverse claims, that tax deeds shall, after a reasonable fixed period, (in the case cited, two years), be conclusive of regularity of the tax procedure.[31]

(9) It is permissible to provide by legislation, for the reopening of an existing judgment not sounding in Contract, and for an inquiry into the merits, (in effect, a new trial).[32]

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[22]Gunn v. Barry, 15 Wall. 610; L 21:212; Edwards v. Kearzey, 96 U. S. 595; L 24:793.

[23]Penniman's Case, 103 U. S. 714; L 26:602.

[24]Railroad v. Hecht, 95 U. S. 168; L 24:423; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602; S 19:308; L 43:567.

[25]Tennessee v. Sneed, 96 U. S. 69; L 24:610.

[26]Vance v. Vance, 108 U. S. 514; S 2:854; L 27:808.

[27]Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437; S 23:234; L 47:249.

[28]Louisiana v. New Orleans, 102 U. S. 203; L 26:132.

[29]Curtis v. Whitney, 13 Wall. 68; L 20:513.

[30]Turner v. New York, 168 U. S. 90; S 18:38; L 42:392.

[31]Davis v. Mills, 194 U. S. 451; S 24:692; L 48:1067 (the statute in question being viewed by the Court as, in substance, nothing more than a Statute of Limitations).

[32]Freeland v. Williams, 131 U. S. 405; S 9:763; L 33:193.

(10) In respect of an existing State judgment not sounding in Contract, it is permissible to provide, by legislation, for the setting up, as against the judgment, of a defence not available to the defendant at the original trial, but, in the view of the Federal law, of meritorious character.[33]

(11) As against existing property-rights, provision may be newly made for adjudication of the fact of death, upon presumptive evidence, and for distribution of property, as in case of death: with provision for constructive notice and for a reasonable period for appearance and claim: whether security be provided or not.[34]

(12) A requirement of law in respect of certain classes of bonds for performance of contracts, that a third person, claiming rights, in himself, must give a certain notice, may, as against existing obligees be modified by extension of the time within which notice must be given.[35]

(13) By the law of a certain State, a mechanic's lien as against a building, was capable, if the building stood upon mortgaged ground, of being made separable, in case of foreclosure, and of attaching to and of being enforced against, the building, separately; and upon sale under the lien, the building was removable. Pending a certain mortgage, a new statute provided for sale of the land and building as a whole, and for Judicial severance, as between the mortgagee, and the lienor, of the proceeds. The statute was held not to affect existing remedy-rights of the mortgagee.[36]

(14) For a right of action by individual creditors of a corporation, against shareholders, a Receiver's action may be substituted.[37]

(15) Existing Remedy at law, in pais, (of a purchase of State public land) in the form of right to perfect title by payment of instalments, may be diminished, in its Equitable aspects, by new statutory right of Executive forfeiture procedure for default in payment.[38]

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[33]Freeland v. Williams, cited above.

[34]Cunnius v. Reading School District, 198 U. S. 458; S 25:721; L 49:1125; Blinn v. Nelson, 222 U. S. 1; S 32:1; L 56:65.

[35]National Surety Co. v. Architectural etc. Co., 226 U. S. 276; S 33:17; L 57:221.

[36]Red River Valley Bank v: Craig, 181 U. S. 548; S 21:703; L 45: 994.

[37]Henley v. Myers, 215 U. S. 373; S 30:148; L 54:240.

[38]Waggoner v. Flack, 188 U. S. 595; S 23:345; L 47:609; (as to another aspect, of this case, see citation of it, § 502, pars. 1 and 3).

CHAPTER LXXXIV.

Illustrative Examples of Right in Existing Remedy.

§ 505. The Matter, Generally.

1. Under a Compact between a State and a new State formed from it, to the effect that all private rights in lands in the new State derived from the laws of the elder State, should be determined by the law of the elder State existing as of the period of separation, it was (in the view of the Impairment Clause) not competent to the junior State to pass an Act relieving occupants of such lands from damages for wrongful detention before suit brought, and requiring the lawful owner to pay for improvements.[1]

2. Tax-receivable public bonds or coupons cannot be deprived of that status;[2] or be subjected to the requirement of producing the bonds, with the coupons;[3] or to a requirement of paying a large license-fee as a condition of offering such coupons for sale.[4]

3. A new burden upon existing Remedy is not justified by the mere fact that it embodies a duty already resting upon the person, or the property, in question.[5]

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[1]Green v. Biddle, 8 Wh. 1; L 5:547; (Impairment clause). The Compact in question left, however, open to the new State, the ordinary power of modification of remedies. Hawkins v. Barney's Lessee, 5 Pet. 457; L 8:190.

[2]Woodruff v. Trapnall, 10 How. 190; L 13:383; Hartman v. Greenhow, 102 U. S. 672; L 26:271; Virginia Coupon Cases, 114 U. S. 269; S 5:903; L 29:185; Royall v. Virginia, 116 U. S. 572; S 6:510; L 29:735; Royall v. Virginia, 121 U. S. 102; S 7:826; L 30:883.

[3]McGahey v. Virginia, 135 U. S. 622; S 10:972; L 34:304.

[4]Cuthbert v. Virginia, 135 U. S. 698; S 10:972; L 34:304 (reported under McGahey v. Virginia, cited above).

[5]Thus, a State statute undertook to provide, in respect of choses in action—of any time within a certain past period of some years—that no action should be maintained thereon, in the Courts of the State, if, in any year of such past period, taxes upon such a chose in action had not been paid within the tax year in and for which it was payable. The statute was held invalid, even in respect of cases in which a contract in question had been made, and had matured, within the State, and both parties had been domiciled there continuously, and

4. It is not permissible to diminish the existing Remedy of the holder of a mortgage, as, by enlarging the mortgagor's rights of redemption;[6] or by imposing upon existing mortgagees, material new duties or conditions.[7]

5. As against existing creditors, a debtor's exemption from execution cannot be newly created or enlarged.[8]

6. Existing Procedure of sale on execution cannot be abridged by a statutory requirement of a minimum price, to be fixed by appraisal.[9]

7. So of mortgage-foreclosure sales, whether under Judicial decree,[10] or in pais.[11]

8. Provision by law of a fixed period of redemption after foreclosure is a Remedy in respect of which a mortgagor, under an existing mortgage, is the beneficiary; and such period cannot, as against such a mortgagor, be annulled or abridged.[12]

9. Rules of evidence, of fundamental character, are matter of right of existing creditors; as, the rule permitting the introduction of expert handwriting testimony in support of the genuineness of a written contract relied upon.[13]

10. Where the shares of stock of a corporation are, by existing law, liable for debts of the corporation, it is not permissible, as against existing creditors, to repeal the provision.[14]

11. A running period within which suit may be brought, cannot be abruptly cut off.[15]

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the duty of paying the annual tax had existed year by year, upon the holder of the credits. Walker v. Whitehead, 16 Wall. 314; L 21:357.

[6]Bronson v. Kinzie, 1 How. 311; L 11:143; Howard v. Bugbee, 24 How. 461; L 16:753; Barnitz v. Beverly, 163 U. S. 118; S 16:1042; L 41:93.

[7]Bronson v. Kinzie, cited above; Bradley v. Lightcap, 195 U. S. 1; S 24:748; L 49:65.

[8]Gunn v. Barry, 15 Wall. 610; L 21:212; Edwards v. Kearzey, 96 U. S. 595; L 24:793.

[9]McCracken v. Hayward, 2 How. 608; L 11:397.

[10]Gantley's Lessee v. Ewing, 3 How. 707; L 11:794.

[11]Bronson v. Kinzie, cited above.

[12]Brine v. Insurance Co., 96 U. S. 627; L 24:858.

[13]McGahey v. Virginia, cited above.

[14]Hawthorne v. Calef, 2 Wall. 10; L 17:776.

[15]Ochoa v. Hernandez, 230 U. S. 139; S 33:1033; L 57:1427; Sohn v. Waterson, 17 Wall. 596; L 21:737; White v. Hart, 13 Wall. 646; L 20:685.

12. A State Insolvency Act, in other respects valid and operative, cannot, as against an existing liability, provide for discharge.[16]

13. Existing tax laws, tending to provide means of satisfaction of a private claim, may fall within the designation of existing Remedy, and within the principles applicable thereto. The situation of Tax law as Remedy ordinarily arises, in practice, as an incident of contracts made by a public of higher or of lower plane: as, a State, or a municipal corporation. Speaking broadly, such laws are, as against an existing creditor, incapable of abrogation.[17]

14. Subject to inherent original limitative definition of the term of life of the corporation, and to provisions for terminability (by the home Jurisdiction) under certain prescribed circumstances,[18] creditors of a corporation of a class not immune from private suit, are, in general, it would seem, entitled to continuance of the life of the corporation, in so far as corporate life is material to existing Remedy.[19]

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[16]Farmers' and Mechanics' Bank v. Smith, 6 Wh. 131; L 5:224.

[17]Von Hoffman v. Quincy, 4 Wall. 535; L 18:403; Memphis v. United States, 97 U. S. 293; L 24:920; Wolff v. New Orleans, 103 U. S. 358; L 26:395; Louisiana v. Pilsbury, 105 U. S. 278; L 26:1090; Ralls County Court v. United States, 105 U. S. 733; L 26:1220; Nelson v. St. Martin's, 111 U. S. 716; S 4:648; L 28:574; New Orleans Board v. Hart, 118 U. S. 136; S 6:995; L 30:65; Seibert v. Lewis, 122 U. S. 284; S 7:1190; L 30:1161; Smith v. Bourbon County, 127 U. S. 105; S 8:1043; L 32:73; Scotland County Court v. Hill, 140 U. S. 41; S 11:697; L 35:351; McCullough v. Virginia, 172 U. S. 102; S 19:134; L 43:382; Graham v. Folsom, 200 U. S. 248; S 26:245; L 50:464; Hubert v. New Orleans, 215 U. S. 170; S 30:40; L 54:144.

There may be, however—as Congressional legislation now is—an indirect and passive practical nullification of tax remedy: as, by lapse of the term of office of municipal officials with no provision for successors, (Barkley v. Levee Comm'rs, 93 U. S. 258; L 23:893; Meriwether v. Garrett, 102 U. S. 472; L 26:197); or a failure of actual choice and qualification of successors, (Thompson v. Allen County, 115 U. S. 550; S 6:140; L 29:472); or by insufficiency of the tax receipts, as fixed before inception of the liability in question. Clay County v. McAleer, 115 U. S. 616; S 6:199; L 29:482.

[18]Mumma v. Potomac Co., 8 Pet. 281; L 8:945; Pendleton v. Russell, 144 U. S. 640; S 12:743; L 36:574.

[19]See Broughton v. Pensacola, 93 U. S. 266; L 23:896; Mt. Pleasant v. Beckwith, 100 U. S. 514; L 25:699; Mobile v. Watson, 116 U. S. 289; S 6:398; L 29:620; Shapleigh v. San Angelo, 167 U. S. 646; S 17:957; L 42:310; Graham v. Folsom, 200 U. S. 248; S 26:

In the case of a private corporation, however, the question is perhaps, of no great practical importance: since, in case of termination, under any circumstances, of the life of such a corporation, there would seem to be recognized by the Federal law, a trust in favor of creditors, upon its assets.[20]

245; L 50:464; Vilas v. Manila, 220 U. S. 345; S 31:416; L 55: 491; cases of municipal corporations, but applicable, it would seem, a fortiori, to private corporations. (The cases above cited arose in the Federal Original Jurisdiction, and the Constitutional question, as such, was not before the Court).

[20]See Bacon v. Robertson, 18 How. 480; L 15:499; Lum v. Robertson, 6 Wall. 277; L 18:743; Northern Pac. Ry. v. Boyd, 228 U. S. 482; S 33:554; L 57:931; Kansas City So. Ry. v. Guardian Trust Co., 240 U. S. 166; S 36:334; L 60:579; (cases arising in the Federal Original Jurisdiction, and not involving Federal Constitutional law; and here cited merely as suggestive).

CHAPTER LXXXV.

FEDERAL, AS DISTINGUISHED FROM STATE, JUDICIAL REMEDY.

§ 506. The Subject, Generally.

With reference to distinction, for the purpose in question, between Federal and State Remedy, within a State, there are three typical possible situations.

(1) Existing Federal Remedy may be Federally Exclusive in the strictest sense: that is to say, incapable of existing as State Remedy; as, in the case of Admiralty Remedy. In such case, the Constitutionally protected right is in and to the existing Federal Remedy.

(2) Where, and in so far as, actual Federal Exclusiveness is mere matter of Congressional policy of the time being, there exists no right in such Remedy as Federal Remedy. If, therefore, there exists, latent, a substantially equivalent State Remedy, which will arise automatically upon withdrawal of the Federal Remedy, the Federal Remedy, (being, in such situation, of purely Federal character), may be withdrawn at pleasure by Congress, in favor of such latent existing non-Federal (State) Remedy.[1]

(3) There may exist in concurrence, at option,—for certain classes of persons or things—a Federal and a State Remedy. To this situation, the principles of the situation last considered above are applicable; and the Federal Remedy may be withdrawn by Congress at will.[2]

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[1]Collector v. Hubbard, 12 Wall. 1, 14; L 20:272.

[2]Assessor v. Osborne, 9 Wall. 567; L 19:748; see Collector v. Hubbard, cited above.

BOOK VI.

THE FEDERAL ORGANIC ADOPTION OR RECOGNITION OF THE GREAT COMMON LAW FIELDS OF LAW AND OF THEIR DEFINITIONS.

PART I.—PREFATORY.—COMMON LAW (CIVIL) AND EQUITY.

PART II.—OTHER FIELDS.—EXTENSION.

PART I.

PREFATORY.—COMMON LAW (CIVIL) AND EQUITY.

CHAPTER LXXXVI.

PREFATORY.

§ 507. The General Principle.

1. For Federal purposes, and to the extent of Federal Sovereignty in one or in another field, the Constitution adopts (a) the Common Law division of law into great fields,[1] and (b) the Common Law definition and delimitation of those fields respectively,—and as of the period (1787-9) of the framing and taking effect of the Constitution.[2]

2. To a certain extent, the adoption is operative solely by way of limitative definition of the Federal intra-State Sovereignty: as, in the case of what we may here broadly characterize as Ecclesiastical law.[3]

§ 508. Close Inter-Relation of Substantive Law and Procedure Law.

In the field to be considered in the successive Chapters of the present Book, Substantive law and Procedure are so closely inter-related that it would be inconvenient and artificial to consider them separately; and these Chapters respectively deal with the matter generally, dealing, however, with only general Procedure aspects.

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[1]Common Law proper, Equity, etc. See below.

[2]§ 509.

[3]Probate law; law of Domestic Relations, etc. See § 553.

CHAPTER LXXXVII.

COMMON LAW (CIVIL) AND EQUITY.[1]

§ 509. Adoption of the Common Law Definition.

In the former of the texts cited, the term "law" means Common Law.[2]

The Constitutional texts cited adopt the Common Law definition of Common Law and of Equity, respectively, as of the period 1787-9.[3]

§ 510. Inter-Relation of the Two Fields.

The inter-relation between the fields of Common Law proper, in its Civil aspect, and Equity, is such that the two fields can most conveniently be considered together.

§ 511. Areal Breadth of the Distinction, in Respect of Federal Courts.

The Constitutional texts cited are operative, in respect of Federal Courts, throughout the United States proper, in Federal, as well as in State area,[4] but not in Foreign Pos-

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[1]Const., Art. III, § 2:—

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * *

Amendment VII:—

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

The first branch of the Seventh Amendment deals only with Federal Courts (see Jury Trial); and the second with both Federal and State Courts (see State Verdict).

[2]Cases cited below.

[3]Parsons v. Bedford, 3 Pet. 433; L 7:732; Gaines v. Relf, 15 Pet. 9; L 13:1071; Surgett v. Lapice, 8 How. 48; L 12:982; Pennsylvania v. Wheeling Bridge, 9 How. 647; L 13:294; McConihay v. Wright, 121 U. S. 201; S 7:940; L 30:932; other cases cited in succeeding sections.

[4]Dunphy v. Kleinsmith, 11 Wall. 610; L 20:223; Curriden v. Middleton, 232 U. S. 633; S 34:458; L 58:765.

sessions of the United States, or upon Federal Courts held in strictly Foreign area.[5]

§ 512. Operation, Proprio Vigore, of the Constitutional Adoption of Equity.

To a certain extent, the Constitutional adoption of Equity is operative, proprio vigore, independently of Congressional action.[6]

§ 513. Remedy at Law as Definitory of Substantive Equity, in the Federal Organic Adoption.

The Constitutional Adoption of the Common Law definition of Substantive Equity includes, as a limitative feature of such definition, absence of full, complete, and adequate remedy at law;[7] and the provision of the first Judiciary Act (now Rev. Stats. § 723) to this effect,[8] is merely declaratory of the Constitutional provision.[9]

The Federally adopted Common Law definition, for the purpose now in question, of remedy at law, looks to substance, not to form. Thus, an assignee of a chose in action, having the right to sue at Common Law in the name of his assignor, has a plain, complete, and adequate remedy at law.[10]

The remedy at law is not necessarily a remedy by affirmative suit; but remedy in the form of awaiting action at

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[5] § 81.

[6] United States v. Detroit Lumber Co., 200 U. S. 231; S 26:282; L 50:499.

[7] Boyce's Ex'ors v. Grundy, 3 Pet. 210; L 7:655; Fenn v. Holme, 21 How. 481, 483; L 16:198; Root v. Railway, 105 U. S. 189; L 26:975; Scott v. Neely, 140 U. S. 106, 110; S 11:712; L 35:358; Southern Pac. R. R. v. United States (No. 1), 200 U. S. 341, 349; S 26:296; L 50:507; other cases cited immediately below.

[8] * * * "suits in Equity shall not be sustained" (in a court of the United States) "in any case where a plain, adequate, and complete remedy may be had at law".

[9] Cases last above cited and Parker v. Winnipiseogee Mfg. Co., 2 Bl. 545, 550; L 17:333; Lewis v. Cocks, 23 Wall. 466, 470; L 23:70; Killian v. Ebbinghaus, 110 U. S. 568, 573, ad fin; S 4:232; L 28:246.

[10] Hayward v. Andrews, 106 U. S. 672; S 1:544; L 27:271; New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205; S 2:279; L 27:484.

law by the opposing party, and presentation of an effectual defence, may be a sufficient remedy at law.[11]

The remedy at law is none the less sufficient to this end by the mere fact that the complaining party is required, at law, to pay, and sue to recover back, (as in the case of taxes);[12] and this is true even where action complained of is challenged as being null and void by reason of inconsistency with Federal law.[13]

The Constitutional conception of remedy at law, for the purposes now in question, is, to a certain extent, elastic and prospective, in that it includes, within certain limits, remedy at law, as existing in the Federal law as of any future period (as a result of Federal Extension or diminution of remedy at law).[14]

§ 514. No Right of Jury Trial in Equity.

A corollary of what has just been said is: that in Equity suits, there is no Constitutional right of trial by jury.[15]

§ 515. Status of a Garnishee.

Garnishment process, accompanying, and an incident of, an action at law, is in legal character a suit in Equity, for enforcement of subrogation of the plaintiff to the rights of the defendant, against the garnishee. A garnishee may, therefore, as of right, set up Equitable defences.[16]

§ 516. Blending of Common Law and Equity Procedure.[17]

There may be a blending of Common Law and Equity

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[11]Boise Artesian Water Co. v. Boise City, 213 U. S. 276; S 29: 426; L 53: 796.

[12]Arkansas Bldg. Ass'n v. Madden, 175 U. S. 269; S 20: 119; L 44: 159. See Shelton v. Platt, 139 U. S. 591; S 11: 646; L 35: 273; Allen v. Pullman Co., 139 U. S. 658; S 11: 682; L 35: 303.

[13]Cruickshank v. Bidwell, 176 U. S. 73; S 20: 280; L 44: 377; Indiana Mfg. Co. v. Koehne, 188 U. S. 681; S 23: 452; L 47: 651.

[14]Thompson v. Railroads, 6 Wall. 134; L 18: 765.

See Extension (§§ 554-556).

[15]Cates v. Allen, 149 U. S. 451; S 13: 883; L 37: 804. § 667.

[16]Schuler v. Israel, 120 U. S. 506; S 7: 648; L 30: 707.

[17]Jud. Code, § 274, b: (Act of March 3, 1915):—

> That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea.

Procedure, provided trial by jury is preserved for Common Law issues of fact.[18]

The distinction between Common Law and Equity is, from the nature of the case, to be observed in a Federal court having both Common Law and Equity jurisdiction.[19]

§ 517. Compensation Procedure in Eminent Domain: —(Damages).

1. In exercise of the power of Eminent Domain, the Judicial field, Federal or State, is limited to the matter of ascertainment of the proper compensation for property taken.[20]

2. Federal Judicial Procedure, in this field, is partly within and partly not within the definition of Common Law and Equity, of the Judiciary Article of the Constitution, and the Seventh Amendment.

(1) It is within those fields in the aggregate, in that it is within the Jurisdictional vesting, by that Article, in the Federal Judiciary, of Common Law and Equity Jurisdiction.[21]

Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

[18]Ely v. New Mexico etc. R. R., 129 U. S. 291; S 9:293; L 32:688; Brown v. Rank, 132 U. S. 216; S 10:54; L 33:340; Idaho etc. Land Co. v. Bradbury, 132 U. S. 509; S 10:177; L 33:433 (cases dealing with Federal area, but applicable to Federal Procedure in State area, the Federal Organic law of the subject being the same for both. See Jury Trial).

[19]Fidelity Mut. L. Ins. Co. v. Clark, 203 U. S. 64; S 27:19; L 51:91; Lantry v. Wallace, 182 U. S. 536; S 21:878; L 45:1218.

[20]See Eminent Domain, Legislative Aspect (§§ 383-402).

[21]Kohl v. United States, 91 U. S. 367; L 23:449; Pacific R. R. Removal Cases, 115 U. S. 1; S 5:1113; L 29:319; Searl v. School District, 124 U. S. 197; S 8:460; L 31:415; Chappell v. United States, 160 U. S. 499; S 16:397; L 40:510; Traction Co. v. Mining Co., 196 U. S. 239; S 25:251; L 49:462; Mason City R. R. v. Boynton, 204 U. S. 570; S 27:321; L 51:629.

(2) It is not "common law" Procedure within the Seventh Amendment, in respect of trial by jury; and trial by jury is not required in the case of Federal takings.[22]

(3) Apart from the Seventh Amendment, (and thereby apart from the question of jury trial), such Procedure, Federal or State, is Federally classed in a general way as Common Law Procedure.[23]

(4) Such Procedure is, however, in a considerable degree, Equitable in nature.[24]

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[22]Bauman v. Ross, 167 U. S. 548; S 17:966; L 42:270; Metropolitan R. R. v. District of Columbia, 195 U. S. 322; S 25:28; L 49:219; Briscoe v. District of Columbia, 221 U. S. 547; S 31:679; L 55:848.

In respect of State takings, as of State Judicial Procedure generally, there is no Federal Constitutional requirement of jury trial. Pearson v. Yewdell, 95 U. S. 294; L 24:436.

[23]See case above cited. See § 667.

[24]Searl v. School District, cited above. See § 401.

PART II.

OTHER FIELDS.—EXTENSION.

CHAPTER LXXXVIII.

THE FEDERAL CONCEPTION AND GENERAL DEFINITION OF CRIME AND OF SUBSTANTIVE CRIMINAL LAW.—PENAL LAW.[1]

§ 518. The General Principle.

The Constitution, in various texts,[2] recognizes and adopts (in part, for the Federal field only; in part, for the State

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[1] As to Criminal Procedure, as such, see that head (§§ 666-679).

[2] Art. I, § 3:—

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

Art. I, § 6:—

The Senators and Representatives * * *. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, * * *.

Art. I, § 8:—

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

Art. II, § 4:—

The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

Art. III, § 2:—

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Art. IV, § 2:—

A person charged in any State, with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

Fifth Amendment:—

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a

field only; and in part, for both fields,) the general Common Law conception, and certain particulars, of the Common Law of Crime.

§ 519. The Affirmative Aspect.

The affirmative aspect of the conception is illustrated in certain specific propositions as follows:—

Knowledge and intent are not absolute essentials; but, within the limits of sound Legislative discretion, persons may be made to act at their peril.[3]

There may be created what may be called Evidential crimes: that is to say, certain classes of acts, not in and of themselves necessarily wrongful, may be made Criminal,

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grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment:—

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Thirteenth Amendment:—

§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

Fourteenth Amendment:—

* * * But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime * * *

So, also, the Ex Post Facto and Attainder and Pardon texts.

[3]Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57; S 30:663; L 54:930.

for the reason that, in the nature of the case, it may be practically impossible to distinguish between wrongful and innocent acts within the class. Thus, the mere having in possession dead game, during a closed season, may be made Criminal.[4]

Corporations may be subjected to Criminal liability.[5]

§ 520. The Limitative Aspect.

The limitative aspect of the Federally adopted Common Law conception is illustrated in the doctrine that Criminal character, in a particular form of private action, cannot be predicated upon independent future acts. Thus, Criminality of an obtaining of goods with intent to defraud, cannot be made to depend upon subsequent institution of even a voluntary Bankruptcy proceeding of the offender.[6]

§ 521. The Definitory or Interpretative Aspect.

1. The Federal adoption, above referred to, operates by way of definition or Interpretation of technical Common Law terms of Criminal law, employed in the Constitution.[7]

2. Acts of Congress dealing with Criminal law likewise employ technical Common Law terms in their technical Common Law sense,[8] and, in general, speak from the Common Law point of view; and their letter is intended by Congress (where a contrary intent is not affirmatively expressed) to be taken as an application to Federal requirements, of the Common Law of Crime; and to be viewed and read (a) as broadened by, and (b) as qualified by, the Common Law of a particular field in question. Thus, an Act, in terms punishing the uttering of forged securities of

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[4]Silz v. Hesterburg, 211 U. S. 31; S 29:10; L 53:75.

[5]New York Centr. R. R. v. United States, 212 U. S. 481; S 29:304; L 53:613; United States v. Union Supply Co., 215 U. S. 50; S 30:15; L 54:87; United States v. Pacific & Arctic Co., 228 U. S. 87; S 33:443; L 57:742; (the latter, a case of a corporation of a Foreign country); other cases.

[6]United States v. Fox, 95 U. S. 670; L 24:538.

This principle has, of course, no application to the first step in a series of steps, all of Criminal character.

[7]This principle is illustrated in respect of terms of Criminal Procedure, as: "jury"; "grand jury". See under those and other particular heads. See also §§ 336-338 ("ex post facto" laws, etc.).

[8]E. g., "piracy" (United States v. Smith, 5 Wh. 153; L 5:57); "utter" (forged paper); (United States v. Carll, 105 U. S. 611; L 26:1135); many other cases.

the United States, without mention of knowledge or intent, was to be read as intending (for the Federal sphere) the Common Law crime of uttering, and as requiring knowledge and intent as an essential of Criminality.[9]

3. The elementary Common Law conception and principle of potential two-fold Criminal aspect of a particular physical act (with the potential result of two or more distinct crimes committed by a single physical act),[10] finds application, in our dual governmental system, in the principle that a particular physical act may constitute both a crime against the United States, and a crime against a State.[11]

4. Except in the case of the Supreme Court, the Constitution does not establish any specific Court or Courts; and, therefore, (except in the case of the Original Jurisdiction of the Supreme Court), it does not (upon the establishment by Congress of a particular inferior Court or class of Courts) operate, proprio vigore, to vest jurisdiction in any particular such inferior Court or Courts; but leaves this whole matter to Congress; and, except in so far as Congress acts, in the Criminal field, in establishing Courts, and in fixing Jurisdiction, no Criminal Jurisdiction (except of the Supreme Court) can arise. Congress must also, as an essential of actual exercise of Criminal Jurisdiction, provide, if not particulars and amount of punishment, at least machinery of enforcement. In certain of the older States, Common Law offences, not specifically dealt with by State statute, are, (or until recently were), indictable, being punishable, in the discretion of the Court, by fine or imprisonment,—the State statutes which pro-

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[9]United States v. Carll, cited above. See United States v. Kirby, 7 Wall. 482; L 19:278.

[10]As in Gavieres v. United States, 220 U. S. 338; S 31:421; L 55:489.

[11]Fox v. Ohio, 5 How. 410, 434; L 12:213; United States v. Marigold, 9 How. 560, 569; L 13:257; Moore v. Illinois, 14 How. 13, 19, 20; L 14:306; Grafton v. United States, 206 U. S. 333, 353, 354; S 27: 741; L 51:1084.

In United States v. Kirby, 7 Wall. 482; L 19:278, the principle is recognized, but was held inapplicable in the particular instance.

See Sexton v. California, 189 U. S. 319; S 23:543; L 47:833.

As to the relation, from the standpoint of two-fold crime, of the United States in its general capacity, and a Federal State, see § 43.

vided machinery of punishment being interpreted to extend to such Common Law offences.

For a long period, (down to the year 1812),[12] it was an open question whether a like Federal view was to be taken in respect of acts of Common Law Criminal character aimed at the United States; and at the period just mentioned, Federal Judicial opinion was divided upon the question.[13]

The view was, however, then in effect taken,[14] that Acts of Congress creating Criminal Courts, providing for Criminal Procedure, and providing punishment for certain specific crimes, are to be interpreted as, in intent and in scope, exclusive: that is to say, as providing Judicial Jurisdiction of, and punishment for, no other offences or acts.[15]

As late, however, as the year 1816, the Supreme Court was willing, in another case, to hear a re-argument of the question,[16] but the Attorney General declined to argue the question, and no counsel appeared for the defendant; and the Court thereupon affirmed the decision of the earlier case above cited;[17] and that case has been recognized and followed since.[18]

Since the two early decisions above cited, the question has been of no practical importance; since it has been open to Congress to provide Jurisdiction and punishment, or

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[12]United States v. Coolidge, 1 Wh. 415; L 4:124; United States v. Hudson, 7 Cr. 32; L 3:259.

[13]Case last cited: division of opinion in the Circuit Court, and (case last cited, p. 33, and United States v. Coolidge, at p. 416), in the Supreme Court.

[14]Cases cited.

[15]United States v. Hudson, cited above. The only question certified was: "whether the Circuit Court of the United States had a common law jurisdiction in cases of libel" (upon the President and Congress); and the actual decision, therefore, could go, and goes, no farther.

This particular case involved bitter party feeling; but for that fact, and for the question involved, of proper liberty of the press, the decision might have been the other way. (See case next below cited).

[16]United States v. Coolidge, cited above.

[17]United States v. Hudson, cited above.

[18]United States v. Britton, 108 U. S. 199; S 2:531; L 27:698; Benson v. McMahon, 127 U. S. 457, 466; S 8:1240; L 32:234; United States v. Eaton, 144 U. S. 677, 687; S 12:764; L 36:591; Manchester v. Massachusetts, 139 U. S. 240, 262; S 11: 559; L 35: 159.

machinery of punishment, for Common Law offences against the United States.

The doctrine thus established, although a mere matter of Interpretation of Judiciary Acts of Congress, is sometimes expressed in the formula: that there are no Common Law crimes against the United States. The formula, however, is not strictly accurate.[19]

§ 522. Penal Law.

What has been said above of Criminal law, is true, mutatis mutandis, of Penal (non-Criminal) law.[20]

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[19]For example, the expression "other high crimes and misdemeanors", in the Impairment text of Art. II, § 4, of the Constitution,

> The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

can hardly be viewed as confined (in respect of acts not of actual or potential State cognizance) to acts punishable by statute.

Benson v. McMahon, cited above, perhaps involves the proposition of extraditable character as crime, of a Common Law forgery, here committed, adverse to the United States, but not punishable at the time by either Federal or State statutes.

[20]For illustration, see §§ 585-587.

CHAPTER LXXXIX.

Admiralty and Maritime Law.

§ 523. Scope of the Chapter.

1. The Adoption, by the Constitution,[1] of the body of Admiralty and Maritime law as existing in 1787-9, presents three principal aspects: (a) it established a field of Federal intra-State Sovereignty; (b) it established, as Federal Organic law, for direct Federal purposes, intra-State, and extra-State, (within the United States proper), a limitative feature of definition, then existing, of Common Law and of Equity, respectively, with the incidental feature of absence of right of trial by jury in Civil causes not (as of that period) of Common Law character; (c) it entered into the Seventh Amendment,[2] when that Amendment came into effect, by way of limitative definition of the term "common law" in that Amendment.

Subject to the domestic rights of Foreign powers, and to the Law of Nations, the Federal Admiralty and Maritime law extends (in respect of American vessels and their incidents, and of American citizens) to Foreign, as to domestic, waters.[3]

2. Since the matter of generic definition of the field of Substantive Admiralty and Maritime law is, thus, not, in its operation, peculiar to State area, we deal with the matter at the present point, rather than in the discussion, at an earlier point, of the Federal intra-State Sovereignty.

3. In so far as, in the present Chapter, we deal with Judicial Procedure, we do so only incidentally, and for the reason that the Substantive law of the subject is, in a considerable degree, closely interwoven with, and is in large

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[1]Judiciary Article.

[2]In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

[3]The Eagle, 8 Wall. 15; L 19:365; United States v. Rodgers, 150 U. S. 249; S 14:109; L 37:1071; Panama R. R. v. Napier Shipping Co., 166 U. S. 280; S 17:572; L 41:1004.

measure presented only in and through, Judicial Procedure.[4]

§ 524. Early American, rather than English, Particularizations, Adopted.

In so far as there had been general concurrence in the Colonies, (and, thereafter, in the States), with common departure from the Admiralty and Maritime law as recognized in England, the Constitution is deemed to have adopted the American, not the English, particularizations.[5]

§ 525. Overlapping of Fields.

Owing to the general character of the Ocean, outside the areal limits of particular countries; to the international character, in some degree, of Ocean waters within the areal limits of particular countries;[6] and to the international aspects of Admiralty and Maritime law, the field of Admiralty and Maritime law, and that of the Law of Nations, overlap each other, to a considerable extent; and, in various situations, the pertinent law is a resultant of concurrent operativeness of principles partly of one field and partly of the other field.[7]

§ 526. Presence (in Admiralty and Maritime Law) of Principles of General Law.

Such principles of the general law of any political society as are pertinent to Admiralty and Maritime law (as adopted by such society) enter pro tanto, and are part and parcel of, the Admiralty and Maritime law, as so adopted. In England, and in this country, Common Law and Equity principles have such recognition and adoption. This proposition is illustrated, in our Admiralty and Maritime law, by the presence of the Common Law doctrine of Estoppel,[8] and of the Common Law doctrine that if a duty is im-

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[4]Particulars of Admiralty Procedure, as such, are not within the field of the present treatise. See Preface.

[5]Waring v. Clarke, 5 How. 441; L 12:226; The Belfast, 7 Wall. 624, 636; L 19:266; In re Garnett, 141 U. S. 1, 14; S 11:840; L 35:631.

[6]I. e., within the so-called "three-mile" limit.

[7]See Chisholm v. Georgia, 2 Dal. 419, 475; L 1:440; Parsons v. Bedford, 3 Pet. 433, 446, et seq.; L 7:732; The Maggie Hammond, 9 Wall. 435, 452; L 19:772.

[8]The Germanic, 196 U. S. 589; S 25:317; L 49:610.

posed by law (as, of keeping a light) for a special purpose, a breach of it does not create a liability for the (negligent) tort of a stranger, simply because the observance of the duty might have prevented the tort;[9] and, in general, of the Common Law principles relating to Common Carriers;[10] in Admiralty practice of chancering a bottomry bond,[11] or a charter-party, containing a penalty clause;[12] and of inquiring into Equities, in dealing with salvage contracts;[13] in the principle of following the proceeds;[14] and in the principle that what should have been done is to be deemed to have been done.[15]

§ 527. Common Law Remedy as Concurrent.

By the law of England, remedy in the Admiralty Courts was not exclusive, where the Common Law was competent to give a remedy; and, in such situation, the Jurisdiction of Admiralty, and that of the Common Law were concurrent. This principle, with other particulars of the English Admiralty and Maritime law, was a feature of the Constitutional adoption of the latter law; and the provision of the Judiciary Act of 1789 (now Rev. Stats. Sect. 711, "Third") saving to suitors in all [Admiralty] cases, the right of a Common Law remedy, where the Common Law is competent to give it, is, therefore, pro tanto, merely declaratory of the Common Law definition and conception of Admiralty Procedure.[16]

The Common Law remedy may be pursued indifferently: (a) in a State Court,[17] or, (under general principles of Federal enforcement, at Common Law or in Equity, of

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[9]The Eugene F. Moran, 212 U. S. 466; S 29:339; L 53:600.

[10]The Kensington, 183 U. S. 263; S 22:102; L 46:190.

[11]The Virgin, 8 Pet. 538; L 8:1036.

[12]Watts v. Camors, 115 U. S. 353; S 6:91; L 29:406.

[13]Houseman v. Schooner North Carolina, 15 Pet. 40; L 10:653; The Elfrida, 172 U. S. 186; S 19:146; L 43:413.

[14]United States v. Cornell Steamboat Co., 202 U. S. 184; S 26:648; L 50:987; (holding a lien, for salvage, enforceable in the Court of Claims, without process in Rem, against duty-money refundable by the United States).

[15]United States v. Cornell Steamboat Co., cited above (presumption of proper action by the Secretary of the Navy).

[16]See Cases cited below.

[17]Baldwin v. Black, 119 U. S. 643; S 7:326; L 30:530 (sequestration of a vessel); Steamboat Co. v. Chase, 16 Wall. 522; Chappell v.

State law),[18] in a Federal Court, according to general principles of State, or of Federal, Common Law Jurisdiction, in a particular instance; and the principles of Common Law Remedy are applicable, not merely to causes of action specifically known to the Common Law, but in like manner to causes of action based upon statutory Extensions, Federal or State, of the Substantive Admiralty and Maritime law.[19]

§ 528. Congressional Delegation to the Judicial Branch.

In a very material degree, Congress may delegate to the Judicial Branch (acting by Rules of Court) the Congressional power in the general field in question.[20]

§ 529. Federal Exclusiveness; Federal Concession to States.

In the field of Substantive Admiralty and Maritime law, the Federal Exclusiveness as between the United States and the States severally, is partly of the highest, partly of the intermediate, and partly of the lowest, of the three types of Federal Exclusiveness (actual and potential) elsewhere considered.[21]

That is to say: it is (a) in part incapable of relaxation by Congress; (b) in part capable of relaxation by Congress; (c) in part presumptively latent, in the absence of action by Congress.

Bradshaw, 128 U. S. 132; S 9:40; L 32:369, (action of trespass for a maritime tort); Leon v. Galceran, 11 Wall. 185; L 20:74; (action in personam, for a seaman's wages, with attachment of the vessel on mesne process); Schoonmaker v. Gilmore, 102 U. S. 118; L 26:95; (action in personam for a collision in Admiralty waters); Johnson v. Chicago, etc. Elevator Co., 119 U. S. 388; S 1:254; L 30:447; (attachment of a vessel, upon mesne process from a State Court, in tort); Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638; S 20:824; L 44:921 (enforcement in rem of a Common Law, not a Maritime, lien, on a raft, for a Maritime clime for towage).

[18]§§ 763-771.

[19]As in cases cited above.

As to Extension, generally, see that head (§§ 554-556).

[20]The Corsair, 145 U. S. 335; S 12:949; L 36:727. See Admiralty Rules of the Supreme Court.

[21]§§ 122-124.

Exclusiveness of the first plane must be deemed to exist in broad features of the matter; as, in the field of Limitation of Liability.

Exclusiveness of the second plane is illustrated in affirmative Congressional vesting, or recognition, of State power over Pilotage,[22] and in specific Congressional consent to the building by States of bridges over Admiralty streams, or to State improvement of such streams.

Exclusiveness of the third plane is seen in the power of States, in the absence of Congressional action, to deal with Pilotage, and to make Legislative Extension,[23] (operative within the borders of such States, respectively) of the Substantive law of Maritime Lien, and, indirectly, of Maritime Torts.

§ 530. State Power of Improvement of Navigable Streams.

In the absence of Congressional action, and subject to future Congressional action, a State (and, we may assume, a self-governing Federal State), may make, or may authorize the making of, improvement of a navigable stream within the State.[24]

§ 531. Power of a State, or of a Self-Governing Federal State, in Respect of Filling Non-Navigable Water Areas.

In the absence of action by Congress, a State, (and, we may assume, a self-governing Federal State), may fill, or may authorize the filling of, non-navigable portions of a body of water, partly navigable,[25] providing, of course, that there be no lessening of navigability of the navigable portion.[26]

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[22]Act of 1789, Act of 1837 (Rev. stats., §§ 4235, 4236); Steamship Co. v. Portwardens, 6 Wall. 31, 33; L 18:749.

[23]See Extension.

[24]Huse v. Glover, 119 U. S. 543; S 7:313; L 30:487; Kaukauna Co. v. Green Bay Canal, 142 U. S. 254; S 12:173; L 35:1004; Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82; S 33:679; L 57:1083.

As to Property interests, in such case, see Water Areas (§§ 485-489).

[25]Hoboken v. Pennsylvania R. R., 124 U. S. 656; S 8:643; L 31:543.

[26]As to Property interests, see Water Areas, (§§ 485-489).

§ 532. Power of a State, or of a Self-Governing Federal State, in Respect of Structures in Admiralty Waters.

In accordance with principles above considered, and subject to like qualifications, a State, (and, we may assume, a self-governing Federal State), may erect, or may authorize the erection of, wharves, piers, logging-booms, ordinary highways, railroads, and other structures in a non-navigable portion of a body of water broadly (and, in the discretion of Congress, wholly), of Admiralty character: as, in the case of shallow in-shore portions, capable of navigability by dredging, but not presently navigable.[27]

§ 533. Congressional Concession as Capable of Revocation.

In granting concessions to State authority in the general field in question, Congress acts upon its view, at the time, of Federal Public Policy; and, pursuant to the general doctrine of that subject,[28] a concession may be qualified or withdrawn, by Congress, in its discretion, even after State action has been taken under the concession: as, in the matter of erection of a bridge over navigable waters.[29]

§ 534. Federal Law as Dominative.

Where, or in so far as, as of a given period, the States severally possess power of action in the Substantive Admiralty or Maritime field, the Federal law is dominative over State law; as, in the precedence of a Maritime lien over a State lien otherwise effectual.[30]

§ 535. No Limitative Operation of State Law.

State law is of no limitative operation upon Admiralty and Maritime law. Thus, breach of a State Sunday law

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[27]Railroad v. Schurmeir, 7 Wall. 272; L 19:74; Weber v. Harbor Comm'rs, 18 Wall. 57; L 21:798; Illinois Centr. R. R. v. Illinois, 146 U. S. 387; S 13: 110; L 36: 1018; (and, with names reversed, 184 U. S. 77; S 22:300; L 46:440); North Shore Boom Co. v. Nicomen Boom Co., 212 U. S. 406; S 29:325; L 53:574 . See United States v. Bellingham Bay Boom Co., 176 U. S. 221; S 20:343; L 44:437; (a case of a structure impeding navigation and not erected under and in compliance with, State law).

[28]See Public Policy.

[29]Bridge Co. v. United States, 105 U. S. 470; L 26:1143.

[30]Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578; S 3:379; L 27:1038; Moran v. Sturges, 154 U. S. 256; S 14:1019; L 38:981; The John G. Stevens, 170 U. S. 113; S 18:544; L 42:969; see Priority (§§ 621-626).

is not a defence, in an Admiralty Court, for a Maritime tort.[31]

By the law of a certain State, the relation of master and servant did not exist between a certain municipal corporation of that State and the members of its Fire Department; and, on that ground, the corporation was, as matter of law of that State, not legally responsible for unlawful acts of those officials, even when done in the course of performance of their duties. The Maritime law, however, is to the contrary, and a libel in personam against the corporation was sustained.[32]

So, of local State rule of construction of charter-parties.[33]

§ 536. Private Obstruction:—Non-Compliance with Valid State Sanction.

1. Private action in obstruction of navigable waters, is, of course, of Federal cognizance.[34]

2. Where, under principles considered above, a State effectually gives sanction to obstruction otherwise unlawful, non-compliance with the particulars of the State sanction leaves the individual in the position of a wrong-doer.[35]

§ 537. Definition of Admiralty Waters:—(a) Prefatory Observation.[36]

In State area proper, the definition of Admiralty waters, as such, is broadly definitory of the Federal intra-State Sovereignty. In Federal area within the United States proper, its chief operation is in respect of right of trial by jury. In other Federal area, (Foreign Possessions of the United States), its operation is chiefly, or wholly, of international aspect. The Federal conception and definition, however, of Admiralty waters, is one and the same for the Realm as a whole.

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[31]Philadelphia etc. R. R. v. Philadelphia etc. Towboat Co., 23 How. 209; L 16:433.

[32]Workman v. New York City, 179 U. S. 552; S 21:212; L 45:314.

[33]Watts v. Camors, 115 U. S. 353; S 6:91; L 29:406.

[34]United States v. Bellingham Bay Boom Co., 176 U. S. 211; S 20:343; L 44:437.

[35]Case cited.

[36]See also §§ 485-489.

§ 538. Definition of Admiralty Waters:—(b) Particulars of Definition.

At the outset, the Constitution, in its Adoption of Admiralty and Maritime law, was deemed to have adopted the English conception and definition of Admiralty waters; and to have limited such waters to the ebb and flow of the tide.[37]

In view, however, of the wide difference in physical conditions between England and this country, a different view ultimately prevailed; and navigability was established as the standard of definition.[38]

Navigability must be of some material degree and extent.[39]

It need not be continuous through the whole year, or at all states of the water.[40]

There is no generic difference between natural bodies of water, and artificial bodies, as, canals,[41] or dry-docks.[42]

§ 539. Land Area as Incidental to Admiralty Water Area.

Land area, closely connected with Admiralty water area, partakes of the character of Admiralty waters, in so far as is requisite to Admiralty Jurisdiction over water area.

(1) Riparian Land.—Congress may punish larceny on the shore, above high-water mark, of goods which had belonged to a shipwrecked vessel.[43]

The principle does not extend to a building upon riparian land, burned by a fire originating, by negligence, in a ves-

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[37]The Thomas Jefferson, 10 Wh. 428; L 6:350; Steamboat Orleans v. Phoebus, 11 Pet. 175; L 9:677; Allen v. Newberry, 21 How. 244; L 16:110; Maguire v. Card, 21 How. 248; L 16:118; The Hine v. Trevor, 4 Wall. 555; L 18:451; see the Eagle, 8 Wall. 15, 17; L 19:365.

[38]The Genesee Chief, 12 How. 443; L 13:1058; followed in many cases since.

[39]Veazie v. Moor, 14 How. 568; L 14:545; Leovy v. United States, 177 U. S. 621; S 20:797; L 44:914.

[40]Nelson v. Leland, 22 How. 48; L 16:269.

[41]Ex parte Boyer, 109 U. S. 629; S 3:434; L 27:1056.

[42]The Steamship Jefferson, 215 U. S. 130; S 30:54; L 54:125; see The Robert W. Parsons, 191 U. S. 17; S 24:8; L 48:73.

[43]United States v. Coombs, 12 Pet. 72; L 9:1004.

sel;[44] or to damage, by projecting spars of a vessel, to a building, or to goods, upon land.[45]

(2) The Bed of Admiralty Waters.—Piles, fixed in the bed of a navigable river, and, without lawful excuse, not showing above the surface of the water, or a private pier, unlawfully erected, causing injury, in either case, to a vessel, may give rise to a maritime tort.[46]

Conversely, a beacon having its base lawfully fixed in the bed of navigable water, may give rise to a maritime tort, as against a vessel negligently colliding with, and injuring, such beacon;[47] or, (as a secondary result of the collision), injuring another vessel.[48]

Wharfage dues are of Admiralty cognizance;[49] and wharf regulations.[50]

The principle in question does not extend to the case of damage by a vessel to pipes laid on the bottom of a navigable body of water,[51] or to features of the bed-soil having no relation to navigation: (as, oyster-beds);[52] or to bridges. Thus, damage by a vessel to a bridge and its piers, is not of Admiralty cognizance.[53]

Nor can a maritime lien attach to a bridge.[54]

§ 540. Maritime Contract.

In respect of Maritime Contract, there is occasion only for reference to certain definitory decisions.[55]

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[44]The Plymouth, 3 Wall. 20; L 18:125; Ex parte Phenix Ins. Co., 118 U. S. 610; S 7:25; L 30:274.

[45]Johnson v. Chicago etc. Elevator Co., 119 U. S. 388; S 7:254; L 30:447.

[46]Philadelphia etc. R. R. v. Philadelphia etc. Towboat Co., 23 How. 209; L 16:433; Atlee v. Packet Co., 21 Wall. 389; L 22:619.

[47]The Blackheath, 195 U. S. 361; S 25:46; L 49:236.

[48]The Raithmoor, 241 U. S. 166; S 36:514; L 60:937.

[49]Ex parte Easton, 95 U. S. 68; L 24:373.

[50]The James Gray v. The John Frazer, 21 How. 184; L 16:106.

[51]Phœnix Construction Co. v. Steamer Poughkeepsie, 212 U. S. 558; S 29:687; L 53:651.

[52]Smith v. Maryland, 18 How. 71; L 15:269; McCready v. Virginia, 94 U. S. 391; L 24:248.

[53]Cleveland Terminal R. R. v. Cleveland S. S. Co., 208 U. S. 316; S 28:414; L 52:508; Martin v. West, 222 U. S. 191, 197; S 32:42; L 56:159; So, The Troy, 208 U. S. 321; S 28:416; L 52:512.

[54]The Rock Island Bridge, 6 Wall. 213; L 18:753.

[55]The field of Maritime Contract does not extend to mortgage on a vessel from the standpoint of foreclosure procedure (Bogart v. The

§ 541. Maritime Tort.

One of the features of definition of Admiralty and Maritime law, as Federally adopted, is the definition of Maritime tort.

Maritime tort is capable of being committed only upon or in some relation to a vessel on Admiralty waters; or otherwise in direct relation with some feature or incident of Maritime life.

In and of itself, however, and apart from such concomitants, Maritime tort does not generically differ from tort in general. Thus, a forcible and unlawful seizure of money upon a vessel, at sea,[56] is a Maritime tort only by reason of the locus of the act.

Where, for example, negligence is the foundation of the tort, the negligence need not be intrinsically of Maritime character.[57]

So, the Common Law principle is operative: that it is only those who are, in legal contemplation, in a position to act, who are capable of committing a tort.[58]

John Jay, 17 How. 399; L 15:95); to contractual relations between the owners and the agent of a vessel (Minturn v. Maynard, 17 How. 477; L 15:235; The Eclipse, 135 U. S. 599; S 10:873; L 34:269); to contract between connecting-water carriers, as, to shipment of freight, for a continuous line of transit (Vandewater v. Mills, 19 How. 82; L 15:554); to mere commercial ventures of incidental maritime aspect (Grant v. Poillon, 20 How. 162; L 15:871); to contract for the building of vessels (People's Ferry Co. v. Beers, 20 How. 393; L 15:961; Roach v. Chapman, 22 How. 129; L 16:294; The Valencia, 165 U. S. 264; S 17:323; L 41:710); to contract of partnership for use of a vessel (Ward v. Thompson, 22 How. 330; L 16:249); to relations as among individual pilots in a voluntary association (Guy v. Donald, 203 U. S. 399; S 27:63; L 51:245).

[56]As in Manro v. Almeida, 10 Wh. 473; L 6:369.

[57]Leathers v. Blessing, 105 U. S. 626; L 26:1192; (a case of negligence in allowing an object—part of the freight—to fall upon a person crossing the gang-plank). So of injury to a stevedore by defective loading apparatus. The Max Morris, 137 U. S. 1; S 11:29; L 34:586. So Atlantic Transport Line v. Imbrovek, 234 U. S. 52; S 34:733; L 58:1208. So of injury to a vessel from a concealed defect in a berth assigned to her at a private wharf. Smith v. Burnett, 173 U. S. 430; S 19:442; L 43:756. So of injury to a vessel by piles not showing above the surface of the water. Philadelphia etc. R. R. v. Philadelphia etc. Towboat Co., 23 How. 209; L 16:433.

[58]The Clarita and The Clara, 23 Wall. 1; L 23:146; (a vessel on fire, and in control of a salving tow-boat, not employed by the owner of the vessel, held not liable for negligence of the tow-boat).

Such general aspect of Maritime tort is illustrated by the receptivity, into the field, of statutory choses in action: as, for wrong resulting in immediate death.[59]

In Maritime tort as such, the Common Law doctrine of contributory negligence, as negatory of a cause of action, does not prevail,[60] but negligence of one party or of both operates as a mere factor. In case of negligence of two parties, and injury thereby of an innocent party, there is distribution of fault, as between the negligent parties.[61]

§ 542. Vessel.

The definition of Admiralty and Maritime law involves definition of a vessel. Illustrative examples of particular definition in this field are cited in the margin.[62]

§ 543. Public Vessels.

Public vessels, whether of the United States,[63] or of a State or its instrumentalities,[64] are not, by reason of their public character, exempt from the operation of the Substantive Admiralty and Maritime law.[65]

§ 544. Vessels and Their Accompaniments as Mere Chattels.

A vessel, its furniture and accompaniments, held and used in Admiralty waters, are not by the Federal Organic law, or by present actual non-Organic Federal law, broadly denatured as chattels, but, in so far as is not material to the occasions of such Federal law, are within the general principles of law dealing with chattels: as, in respect of situs, as between or as among the States or the Federal

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[59]§§ 554-556; 768, 769.

[60]The Max Morris, cited above.

[61]Erie R. R. v. Erie Transp'n Co., 204 U. S. 220; S 27:246; L 51:450; The Ira M. Hedges, 218 U. S. 264; S 31:17; L 54:1039.

[62]The designation "vessel" (and its equivalents) may, to this intent, include a canal-boat (Ex parte Easton, 95 U. S. 68; L 24:373); but not a floating and moveable dry-dock kept permanently at one place, Cope v. Vallette Co., 119 U. S. 625; S 7:336; L 30:501 (salvage).

[63]The Siren, 7 Wall. 152; L 19:129.

[64]Workman v. New York City, 179 U. S. 552; S 21:212; L 45:314.

[65]See §§ 610 et seq.

States, for taxation or for transfer;[66] of execution or attachment;[67] or of enforcement of a State-created lien.[68]

§ 545. Limitation of Liability.

In respect of limitation to the vessel and its incidents, of personal liability, under certain conditions, there was a difference in doctrine among the Maritime Powers of Europe, at the time of the taking effect of the Constitution of the United States. Among the Continental nations of Europe, limitation of liability (with more or less variation in particulars) prevailed; and such was the early historical view.[69] In England a contrary doctrine prevailed.[70] The Constitution adopted the English doctrine.[71] The Constitution being, however, in this respect, of mere Legislative (not Organic) character, Congress has established in the Federal law the Continental European doctrine, in its general aspects.[72]

§ 546. Admiralty Procedure as Exclusively Federal.

Admiralty Procedure is of exclusive Federal cognizance,[73] even for enforcement of permissible State Extensions of Substantive Admiralty and Maritime law.[74]

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[66]See Situs of Corporeal Chattels.

[67]Taylor v. Carryl, 20 How. 583; L 15:1028; Leon v. Galceran, 11 Wall. 185; L 20:74; Pennywit v. Eaton, 15 Wall. 382; L 21:114; Johnson v. Chicago, etc. Elevator Co., 119 U. S. 388; S 7:254; L 30:447; Lawton v. Steele, 152 U. S. 133; S 14:499; L 38:385; The Winnebago, 205 U. S. 354; S 27:509; L 51:836; Martin v. West, 222 U. S. 191; S 32:42; L 56:159; Rounds v. Cloverport Foundry, 237 U. S. 303; S 35:596; L 59:966.

[68]United States v. Ansonia Brass Co., 218 U. S. 452; S 31:49; L 54:1107.

[69]Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 593; S 3:379; L 27:1038; In re Garnett, 141 U. S. 1, 13; S 11:840; L 35:631.

[70]Ubi supra. [71]Ubi supra.

[72]Butler v. Boston S. S. Co., 130 U. S. 527; S 9:612; L 32:1017.

The particulars of this field are not within the field of the present treatise. See Preface.

[73]The Moses Taylor, 4 Wall. 411; L 18:397; The Hine v. Trevor, 4 Wall. 555; L 18:451; The Belfast, 7 Wall. 624; L 19:266; Moran v. Sturges, 154 U. S. 256, 276 et seq.; S 14:1019; L 38:981; The Glide, 167 U. S. 606; S 17:930; L 42:296; The Roanoke, 189 U. S. 185; S 23:491; L 47:770.

[74]Cases cited.

Such State Extensions are regularly enforceable in a Federal Court of Admiralty: as, in the case of new Maritime torts, created (as matter of Substantive law) by a State;[75] or of new Maritime liens, so created.[76]

Such State Extensions of (Substantive) Admiralty and Maritime law, where, or in so far as they are inherently capable of enforcement by Common Law Procedure, are so Federally enforceable.[77]

§ 547. Potential Congressional Adoption of Local Procedure Law.

It is competent to Congress to adopt, for Admiralty Procedure, certain particulars of Procedure law of a State: as, for example, rate of interest pending suit.[78]

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[75]Cases above cited; The Albert Dumois, 177 U. S. 240; S 20:595; L 44:751; The Hamilton, 207 U. S. 398; S 28:133; L 52:264.

[76]Peyroux v. Howard, 7 Pet. 324; L 8:700; The St. Lawrence, 1 Black, 522; L 17:180; The J. E. Rumbell, 148 U. S. 1; S 13:498; L 37:345.

[77]§ 527.

[78]The Conemaugh, 189 U. S. 363; S 23:504; L 47:854.

CHAPTER XC.

MILITARY LAW.—MARTIAL LAW.

§ 548. Military Law:—General View.[1]

What is known as Military law (as distinguished from Martial Law) is a body of principles and rules (Written or Unwritten, in whole or in part) of government of the individuals composing a military or naval force, and of persons closely associated in status with such a force.[2]

The Federal law adopts, in this field, as matter of Federal Organic law, the English Common Law conception and definition of the field. The primary and most fundamental aspect and operation of such Federal adoption are seen in the negative and limitative definition, by Military law, of the scope of Organic right to the grand jury and to trial jury, in Criminal cases.[3]

The Common Law conception and definition, thus Federally adopted, were of a general nature, dealing rather with principle and reasoning than with particulars; and particularization of definition is left by the Federal Organic law largely (a) to Congress, and (b) to the Executive, in its Military field of power.[4]

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[1]As to the historical origin (in 1776) of the actual Federal Military law, see McClaughry v. Deming, 186 U. S. 49, 55; S 22:786; L 46:1049.

[2]As, a paymaster's clerk. Ex parte Reed, 100 U. S. 13; L 25:538; Johnson v. Sayre, 158 U. S. 109; S 15:773; L 39:974.

[3]Fifth Amendment:—No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; * * *

(The qualification "when in actual service" * * * obviously relates only to the militia).

The provision of the Judiciary Article, "The trial of all crimes, except in cases of impeachment, shall be by jury" is to be read as not including crimes within the field of Military Law. (Cases cited below in this Chapter).

[4]Smith v. Whitney, 116 U. S. 167, 182 et seq.; S 6:570; L 29:601.

§ 549. Specific Organic Features.

The specific Organic features of the field, in the Federal law, may be summarized as follows:—

(1) The Civil Courts have jurisdiction to inquire into, and to pass upon, questions of jurisdiction of Military Courts.[5]

(2) Where a Military Court has jurisdiction, the Civil Courts have no Revisory power.[6]

(3) Where there is color of jurisdiction in a Military tribunal, its judgment cannot be challenged collaterally in a Civil Court.[7]

(4) The potential field of Military law may be allotted, in so far as is practicable, to Civil Courts.[8]

(5) The Common Law institutions of grand jury and trial jury for Criminal prosecutions, do not extend to the field of Military law.[9]

(6) The Military Jurisdiction potentially extends to civilians employed in connection with the Army or Navy.[10]

(7) It extends to State Militia, within the field covered by the Militia clause of the Constitution.[11]

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[5]Smith v. Whitney, 116 U. S. 167; S 6:570; L 29:601; In re Grimley, 137 U. S. 147; S 11:54; L 34:636; McClaughry v. Deming, 186 U. S. 49; S 22:786; L 46:1049; Grafton v. United States, 206 U. S. 333; S 27:749; L 51:1084.

[6]Ex parte Vallandigham, 1 Wall. 243; L 17:589, (a case of Martial law, but applicable, a fortiori, to Military law); Ex parte Reed, 100 U. S. 13; L 25:538; Ex parte Mason, 105 U. S. 696; L 26:1213; Wales v. Whitney, 114 U. S. 564; S 5:1050; L 29:277; Johnson v. Sayre, 158 U. S. 109; S 15:773; L 39:914; In re Vidal, 179 U. S. 126; S 21:48; L 45:118.

[7]Keyes v. United States, 109 U. S. 336; S 3:202; L 27:954; Mullan v. United States, 140 U. S. 240; S 11:788; L 35:489; United States v. Fletcher, 148 U. S. 84; S 13:552; L 37:378; In re Chapman, 166 U. S. 661; S 17:677; L 41:1154; Carter v. McClaughry, 183 U. S. 365; S 22:181; L 46:236.

(Runkle v. United States, 122 U. S. 543; S 7:1141; L 30:1167, in so far as it is to the contrary, is to be viewed as overruled by the later cases cited. See In re Chapman, at p. 670).

[8]Franklin v. United States, 216 U. S. 559; S 30:430; L 54:615.

[9]Dynes v. Hoover, 20 How. 65; L 15:838.

[10]Ex parte Reed; Johnson v. Sayre, both cited above.

[11]Martin v. Mott, 12 Wh. 19; L 6:537; McClaughry v. Deming, cited above, pp. 54 et seq. See the exception text of the Fifth Amendment, cited above.

§ 550. Martial Law.

Underlying various specific doctrines of private right, in the Common Law, was the principle of establishment of an approximation to a military dictatorship, under conditions of grave public emergency. This principle is particularized, at the Common Law, in one of its aspects, by right of suspension of the writ of habeas corpus; and suspension of that writ is, at the Common Law, representative of the general principle of Martial law. The Constitution adopts, by necessary implication, the latter specific principle,[12] and thereby adopts the general Common Law principles of Martial Law.[13]

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[12]Art. I., § 9:—

> The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[13]As to Martial Law in general, and in particular, apart from War or Belligerency, see Ex parte Dorr, 3 How. 103; L 11: 514.

CHAPTER XCI.

THE LAW OF NATIONS.—BANKRUPTCY.—ECCLESIASTICAL LAW.

§ 551. The Law of Nations.

1. EXTERNAL RELATIONS.—By a number of specific texts,[1] the Constitution, in terms, or by clear inference, adopts, as Federal law, for external (or Foreign) relations, the principles of the general Law of Nations as understood and accepted in England at the time of the taking effect of the Constitution.[2]

The scope and breadth of the adoption is illustrated in recognition of the principles of extra-territorial character of the official residences of Ambassadors and the like, and of their households.[3]

2. INTERNAL RELATIONS.—The establishment, by the Declaration of Independence, of Federal Sovereignty and of State Sovereignty; the establishment, by March 1, 1781, of Federal area and of Federal Plenary Sovereignty therein,[4] and the establishment, at an early pre-Constitution period, of the Federal Paramount Sovereignty over and in respect of Indian Tribes, with recognition of such Tribes as, to certain intents, independent nations,[5] involved, prior to the Constitution, Federal Adoption, for internal relations, of certain broad features of the general Law of Nations.[6]

This pre-Constitution Adoption was left undisturbed by the Constitution;[7] but was, on the one hand, regulated by

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[1]Treaty power; recognition by the President of Ambassadors, etc.; offences against the Law of Nations; Judicial Jurisdiction in respect of Ambassadors, etc.

[2]§§ 507, 508.

[3]It is unnecessary to cite authorities to this general proposition. Particulars of the field are not within the scope of the present treatise. (See Preface).

[4]See Book I, Part I; Book II, Part II.

[5]Book I, Part I; Book II, Part I.

[6]Book I, Part I; Book II, Parts I and II.

[7]Ubi supra; § 27.

the Constitution,[8] and was, on the other hand, affirmatively provided for, in some particulars,[9] at least (in respect of certain of such particulars) in a Declaratory manner.[10]

The Adoption—for internal relations—has been, in some degree, particularized by Congress,[11] both as among the States, and as between the United States and the States severally;[12] and the principles have been extended by Congress to relations among different Organized Federal areas (Federal States);[13] and the Adoption has been highly particularized and formulated by Federal Judicial decision;[14] with the result of broad operation, in the Domestic field, of principles of the Law of Nations.

§ 552. Bankruptcy.[15]

Particulars of Bankruptcy law are not within our chosen field of study;[16] and we confine ourselves, at this point, to the matter of Federal Adoption of the English Bankruptcy conception.

(1) At the time of the taking effect of the Constitution of the United States, the general principles of Equity Jurisprudence, (in Substance and in Procedure), specifically dealing with, or applicable to, the estates of insolvents, had been taken over by Parliament, and elaborated into a statutory code, with addition of the feature of Discharge. It

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[8]E. g., inhibition of State-Foreign and inter-State Treaty (or "compact"; "alliance"), unless with the consent of Congress. Const., Art. I, § 10.

[9]Confirmation of existing Indian Treaties (Const., Art. VI; §§ 322 of this treatise); Commerce with Indian Tribes; inter-State full Faith and Credit (§ 644); State Cession to the United States, (§§ 69-80; 143-149).

[10]See under heads above referred to, respectively.

[11]E. g., Faith and Credit legislation (§§ 644-650; §§ 651, 652); Privileges and Immunities (§§ 293, 294); Domestic Extradition (§§ 295-299).

[12]Ubi supra; §§ 213-219.

[13]Ubi supra. Also, Book III, generally, (see, in particular, the opening Chapter, §§ 213-219).

[14]Ubi supra.

[15]Const., Art. I, § 8:—

> The Congress shall have power * * *
>
> To establish * * * uniform laws on the subject of bankruptcies throughout the United States.

[16]See Preface.

was this code to which the Constitutional text, cited above, referred.

(2) It was the general English conception of Bankruptcy, and not particulars of English Bankruptcy statutes, that the Constitution intended; and Congress was not limited by such particulars. Or,—to put the matter in another form,—the Congressional recognition of the English statutory code, carried with it the principle of potential Extension thereof by Congress.[17]

(3) In respect of Discharge,[18] and of extra-State operation,[19] the Federal Bankruptcy power is, of course, within the first class (so characterized at an earlier point),[20] of Federal Exclusiveness; that is to say, the power is, in so far, incapable of delegation to the States severally. In other respects, however, in general, the power is within the third class of Federal Exclusiveness; that is to say, the States severally, (within the general scope of State Sovereignty), may act in, or to the extent of, absence of Congressional action.[21]

§ 553. Ecclesiastical Law.

By the term "Ecclesiastical law," is here intended the fields which may be characterized in general terms as those of Probate and Administration; of Divorce (and other kindred) law; of Guardianship; and of other like domestic relations.

(1) From the Standpoint of Specific Constitutional Text.—The Constitution makes no reference, in terms, to the field in question; and, from the standpoint of specific Constitutional text, the Constitution, by its adoption, in terms, (or by necessary implication from express terms), of the other fields considered in the present Book of our treatise, excludes the field now in question. From this point of view, the Constitution adopts simply the English conception and definition of the field, by way of limitative definition of Federal power.[22]

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[17]See Extension, §§ 554-556.

[18]Farmers' and Mechanics' Bank v. Smith, 6 Wh. 131; L 5:224; §§228-505.

[19]§ 228. [20]§§ 122-124. [21]§ 228.

[22]As to Federal Judicial relations within the field, see §§ 772-776; § 777.

As to areal limitations of State power, see §§ 220-231.

(2) The Question of Other Possible Standpoints.—In certain important portions, if not in the whole, of the field now in question, areal limitation of State Sovereignty[23] makes impossible a systematic dealing with the subject by the States severally; and the question may perhaps, be an open one, whether, to the extent of State incapacity, (and in view of such incapacity), Congressional power may not exist.[24]

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[23]§§ 220-231.

[24]Under the principle considered §§ 161-163.

CHAPTER XCII.

THE FEDERAL DOCTRINE OF POTENTIAL EXTENSION, FEDERAL, OR STATE, OF A CONSTITUTIONALLY ADOPTED COMMON LAW FIELD.

§ 554.

At the Common Law, as of the period, 1787-9, the Common Law conception and definition of the great Common Law fields,[1] was elastic, in this sense: that those fields, respectively, were generically capable of opening to let in new law, of essentially kindred character, newly arising by legislation. This feature (with the other features) of the Common Law conception, was adopted by the Constitution. It has been Judicially referred to as "Extension"; and it has been characterized as the doctrine of potential Extension (of one or of another of the great fields). The doctrine is one of high importance and of broad operation in the field of Federal Constitutional law.[2]

§ 555. **Congressional Extension.—State Extension.**

1. Congressional Extension may be made either (a) to purely Federal intents; or (b) to State intents in so far as State intents are, in general, within Congressional power.[3]

2. State Extension, purely from the State standpoint, is, of course, matter of State discretion: as appears, a fortiori, from the elementary proposition that State division, or absence of State division, of State law into the great Common Law fields is,—in so far as State interests alone are concerned—matter of State discretion. In so far, however, as the Federal Constitutional Adoption of the Common Law division of law into the great Common Law fields, is operative upon the States,[4] potentiality and particulars

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[1]Common Law proper (Civil and Criminal); Equity, etc.

[2]See succeeding sections.

[3]Cases cited in succeeding sections.

[4]As, for example, in respect of finality by the Seventh Amendment of "common law" State verdicts. See, also, a preceding Chapter of the present Part: Common Law.

of State Extension are, to one or to another intent, subject to Federal law.[5]

§ 556. Substantive Law, and Judicial Procedure.

The doctrine of Extension is potentially operative (a) upon Substantive law, apart from Judicial Procedure; or (b) upon Judicial Procedure, apart from Substantive law; or (c) upon Substantive law and Judicial Procedure, collectively. Illustration may be presented as follows:—

(a) Extension of Substantive law, apart from Judicial Procedure, is presented in State statutes extending the law of Tort to the case of instantaneous death. A State statute of this character (1) operates to extend the State law of Tort, for purposes of State enforcement or Federal Common Law enforcement, to such torts committed within the areal limits of the State, even if committed upon intra-State Admiralty waters;[6] and (2) (where such a tort is committed upon such waters) operates, at the option of a plaintiff, to create a Maritime tort, with remedy in (and exclusively in) the Federal Admiralty Judicial Jurisdiction.[7]

(b) Extension operative upon Procedure only, is seen in the Congressional legislation providing for substituted service upon absent defendants, in Federal Equity suits to establish title existing or claimed under State law.[8]

(c) Extension operative both upon Substantive law and upon Procedure, is presented in certain State statutes which (1) extend the Common Law of nuisance to include premises used for the illegal sale of alcoholic liquors, and (2) extend to such premises the Equitable Procedure of Injunction against nuisances, with imprisonment for Contempt for violation of Injunction.[9]

§ 557. Different Forms and Modes of Federal Extension.

Federal Extension is, in practice, made (a) by Congress for the whole Realm, or for the United States proper, as a

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[5]See succeeding sections.

[6]Sherlock v. Alling, 93 U. S. 99; L 23:819.

[7]Johnson v. Southern Pac. Co., 196 U. S. 1. S 25:158; L 49:363.

[8]§ 741.

[9]As in Eilenbecker v. Plymouth County, 134 U. S. 31; S 10:424; L 33:801.

whole;[10] (b) by Congress, but for Federal area (or for certain Federal areas) only;[11] (c) by a self-governing Federal State.[12]

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[10]As, in Extension of Admiralty forfeiture law to the Slave trade (The Slavers, 2 Wall. 350; L 17:909); in Extension of the Common Law of seizure and confiscation, to property used in aid of Insurrection (Union Ins. Co. v. United States, 6 Wall. 759; L 18:879; Armstrong's Foundry, 6 Wall. 766; L 18:882); and Extension of Equity to cancellation of naturalization (Luria v. United States, 231 U. S. 9; S 34:10; L 58:101); or Letters Patent.

[11]Lynch v. Murphy, 161 U. S. 247; S 16:523; L 40:688; (case of a title-clearing Extension of Equity, operative in the District of Columbia).

[12]Parish v. Ellis, 16 Pet. 451; L 10:1028; (statutory provision of a Territory: a procedure not known to the Common Law, for assignment of dower and of widow's right to chattels); Davis v. Alvord, 94 U. S. 545; L 24:283; Idaho & Oregon Land Co. v. Bradbury, 132 U. S. 509; S 10:177; L 33:433; (statutory mechanics' lien, with personal judgment as incident: viewed as Extension of Equity); Ely v. New Mexico etc. Ry., 129 U. S. 291; S 9:293; L 32:688 (title-clearing). For particulars, and for examples of Extension of, or as operative in, Federal Judicial Procedure, see particular Procedure heads.

SECOND DIVISION

LAW OF JUDICIAL PROCEDURE

BOOK VII.

CERTAIN PRINCIPLES OF GENERAL CHARACTER OPERATIVE UPON FEDERAL, AND UPON STATE, PROCEDURE.

PART I.—DUE PROCESS OF LAW IN JUDICIAL PROCEDURE.

PART II.—PRINCIPLES (LARGELY OF UNWRITTEN LAW) OPERATIVE EITHER UPON BOTH FEDERAL AND STATE, OR SOLELY UPON STATE, PROCEDURE.

PART I.

DUE PROCESS OF LAW IN JUDICIAL PROCEDURE.

CHAPTER XCIII.

SCOPE OF THE PART.—CERTAIN PRINCIPLES OF GENERAL CHARACTER.[1]

§ 558. Prefatory:—Quasi-Judicial Procedure.

As has been elsewhere observed,[2] Judicial power and duty are not rigidly limited to Courts and to Judges, properly so-called, but are, to a certain extent, vested in officials primarily of Executive character. Such Procedure, being generically Judicial, is within the scope of the present Part.[3]

§ 559. Adoption of Common Law Conceptions and Principles.

The Due Process text of the Fifth Amendment (operative as against Federal action), and that of the Fourteenth Amendment (operative as against State action), respectively, assume and adopt, in respect of Judicial Procedure (as in other fields) the Common Law conception of Due Process of Law.[4]

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[1]As to differentiation between (a) Due Process as matter of Substantive law, and (b) Due Process as matter of Procedure; and as to Due Process of Law in Legislative or in Executive Procedure, see § 425.

[2]§§ 307; 362-364; 385.

[3]Such Procedure is very commonly characterized as quasi-Judicial: the qualification "quasi" referring, however, not to the generic character of such Procedure, but (a) to the exceptional feature of its being conducted by officials primarily of Executive character, and (b) to its purely collateral position, in relation to Executive Procedure of such officials.

In respect of requirement of notice, in action of minor Legislative character (viewed, pro tanto, as quasi-Judicial) as, in taxation, see Londoner v. Denver, 210 U. S. 373; S 28:708; L 52:1103; Embree v. Kansas City Road District, 240 U. S. 242, 247; S 36:317; L 60:624, and other tax cases cited in the following Chapter.

As to observance of such requirement in Legislative action of higher planes, see Taxation, §§ 362, 363.

[4]See succeeding sections of the present Chapter, and the following Chapter.

Thus, where, by the Procedure law of a particular State, a creditor has not acquired a vested lien in specific property of his debtor, it is

The Common Law conception, while rigid and insistent in essentials, leaves broad liberty in respect of mere form.[5]

§ 560. Forms of Judicial Procedure.

Due Process of law is consistent with great variety in form of Judicial Procedure.[6]

§ 561. Grand Jury:—Trial Jury, Civil or Criminal;—As Not Matter of Due Process.

Due Process of Law as such, does not require grand jury or trial jury in Criminal cases, or trial jury in Civil cases.

What has been said is applicable, a fortiori, to mere particulars of State dealings with grand jury and trial jury.[7]

Requirements of the Constitution upon the Federal Courts, in the field of grand jury and trial jury, are embodied in specific texts, and do not rest upon the Due Process Clause of the Fifth Amendment.[8]

Thus, the Due Process Clause of the Fourteenth Amendment, imposes no requirement in this field, upon the States, severally.[9]

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distributable ratably among creditors generally, by State Insolvency law. Denny v. Bennett, 128 U. S. 489; S 9:134; L 32:491.

[6]Cases, generally, cited in the present Part.

[8]Rogers v. Peck, 199 U. S. 425; S 26:87; L 50:256; Bennett v. Bennett, 208 U. S. 505; S 28:356; L 52:590; Garland v. Washington, 232 U. S. 642; S 34:456; L 58:772; (overruling anything to the contrary in Crain v. United States, 162 U. S. 625; S 16:952; L 40:1095); Grant Timber Co. v. Gray, 236 U. S. 133; S 35:279; L 59:501; Atlantic Coast Line v. Glenn, 239 U. S. 388; S 36:154; L 60:344; Pacific Live Stock Co. v. Oregon Water Board, 241 U. S. 440; S 36:637; L 60:1084; Holmes v. Conway, 241 U. S. 624; S 36:681; L 60:1211; other cases, generally, cited in this and in the following Chapter.

[7]Hallinger v. Davis, 146 U. S. 314; S 13:105; L 36:986; (State statutory provision for optional waiver of jury in capital case, and for trial and ascertainment of "degree" of the crime, by the Court); Brown v. New Jersey, 175 U. S. 172; S 20:77; L 44:119; Lang v. New Jersey, 209 U. S. 467; S 28:594; L 52:894.

[8]See under Grand Jury and Jury.

[9]Hurtado v. California, 110 U. S. 516; S 4:111; L 28:232; Hodgson v. Vermont, 168 U. S. 262; S 18:80; L 42:461; Bolln v. Nebraska, 176 U. S. 83; S 20:287; L 44:382; Maxwell v. Dow, 176 U. S. 581; S 20:448; L 44:597: (Grand Jury).

Maxwell v. Dow, cited above: (jury of eight. The case involves the general doctrine of the text: a jury of eight not being a jury within the Common Law sense of the term as employed in the Constitution).

§ 562. Mingling of Civil and Criminal Procedure.

The Due Process texts do not operate to forbid the mingling, within reasonable limits, of Criminal, with Civil, Judicial Procedure.[10]

§ 563. Punishment for Crime.

In the field of punishment for Crime, there is a broad Legislative discretion.[11]

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[10]Lowe v. Kansas, 163 U. S. 81; S 16:1031; L 41:78: statutory Procedure in a Criminal case, of finding, as against a private prosecutor, (upon acquittal), want of probable cause, followed by a judgment for costs; such person being given opportunity to be heard.

Coffey v. Harlan County, 204 U. S. 659; S 27:305; L 51:666 (Legislative power to provide, in respect of embezzlement by a public official, for imprisonment, and a fine of twice the amount embezzled,—the fine to be enforceable, like a Civil judgment, as against property).

Freeman v. United States, 217 U. S. 539; S 30:592; L 54:874 (Legislative power to punish embezzlement by a public official, by a fixed term of imprisonment, to be followed by a subsidiary term, unless or until the amount of the embezzlement as fixed by the judgment of conviction, is made good. Due Process Clause—framed like the Fifth Amendment—of the "Philippine Bill of Rights").

Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57; S 30:663; L 54:930.

Pico v. United States, 228 U. S. 225; S 33:482; L 57:812; (judgment under statute in a Criminal case: (a) of conviction of Criminal homicide, and (b) of pecuniary indemnity to heirs of the deceased. "Philippine Bill of Rights").

Standard Oil Co. v. Missouri, 224 U. S. 270; S 32:406; L 56:760.

[11]McKane v. Durston, 153 U. S. 684; S 14:913; L 38:867: (the running of a sentence of imprisonment, pending Appellate Proceeding, not violative of Due Process).

Moore v. Missouri, 159 U. S. 673; S 16:179; L 40:301; (increase of scale of punishment for successive offences, even where the first offence was in a Federal, and the subsequent prosecution in a State, Court; and notwithstanding pardon of the earlier offence). So, Carlesi v. New York, 233 U. S. 51; S 34:576; L 58:843.

Craemer v. Washington, 168 U. S. 124; S 18:1; L 42:407: (fixing a later day for execution of sentence, if Appellate procedure runs over a day first fixed).

Murphy v. Massachusetts, 177 U. S. 155; S 20:639; L 44:711: (re-sentence on Appellate reversal of original sentence, without reversal of conviction).

McDonald v. Massachusetts, 180 U. S. 311; S 21:389; L 45:542: (validity of Habitual Criminals Act).

Ughbanks v. Armstrong, 208 U. S. 481; S 28:372; L 52:582 (validity of Indeterminate Sentence law).

Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86; S 29:220;

§ 564. Evidence, Generally.

In the field of Evidence, the Federal Due Process requirements leave a broad Legislative discretion.[12]

§ 565. Self-Incrimination.

Due Process of Law, as such, does not involve freedom from compulsory self-incrimination; and therefore there is no restriction put by the Fourteenth Amendment upon State action in that respect.[13]

L 53:417: mere magnitude of sentence not violative of Due Process: (fine, $1,600,000).

Dowdell v. United States, 221 U. S. 325; S 31:590; L 55:753: provision that an Appellate Court may increase sentence, upon evidence contained in the defendants' Appeal record. (Due Process clause of the "Philippine Bill of Rights").

[12]Camden etc. Ry. v. Stetson, 177 U. S. 172; S 20:617; L 44:721 (Legislative power of providing for physical examination of a party to a civil cause, before trial); Montana Co. v. St. Louis Mining etc. Co., 152 U. S. 160; S 14:506; L 38:398 (inspection—under order of the court—by one party, before trial, of land (of the other party) in question; with enforcement by Contempt Procedure);

Adams v. New York, 192 U. S. 585; S 24:372; L 48:575 (unexplained possession of "policy" tickets as prima facie evidence of participation in lottery scheme):

Consolidated Rendering Co. v. Vermont, 207 U. S. 541; S 28:178; L 52:327 (order of production, by a corporation, of books and papers); Twining v. New Jersey, 211 U. S. 78; S 29:14; L 53:97 (permitting adverse inference, in criminal case, from defendant's failure to testify); Reitler v. Harris, 223 U. S. 437; S 32:248; L 56:497; (statutory provision making recitals in public records prima facie evidence of public action recited); Ontario Co. v. Wilfong, 223 U. S. 543; S 32:328; L 56:544; (tax deed made prima facie evidence of regularity of all proceedings); Jordan v. Massachusetts, 225 U. S. 167; S 32:651; L 56:1038; (requirement, in a criminal case, of only a preponderance of evidence in favor of competency of a juror).

West v. Louisiana, 194 U. S. 258; S 24:650; L 48:965 (State law may permit the introduction, in a criminal trial, against the defendant, of a deposition taken in the defendant's presence before committing-magistrate, on a preliminary hearing).

Kirby v. United States, 174 U. S. 47; S 19:574; L 43:809. (Legislative action, however, in this field, must be consistent with essential principles of justice. Thus, it is not permissible to provide by statute that conviction of one for larceny is sufficient evidence of the theft, as against an alleged receiver).

McFarland v. American Sugar Co., 241 U. S. 79; S 36:498; L 60:899; (a case of unwarranted statutory presumption).

[13]Twining v. New Jersey, 211 U. S. 78; S 29:14; L 53:97. (As to Constitutional limitation of Federal action, in this respect, see § 674).

CHAPTER XCIV.

NOTICE AND OPPORTUNITY TO BE HEARD:—HEARING.

§ 566. The General Principle.

The Federal conception of Due Process of Law, as applied to Judicial Procedure, involves a requirement of notice and opportunity to be heard, in accordance with (but only to the extent of) the Common Law conception of the matter.[1]

§ 567. Various Particulars.

1. Notice must, as matter of definition, be sufficient in point of time allowed.[2]

2. Form of expression, of notice, is not to be closely scrutinized; it is sufficient if the language be clear from a practical point of view.[3]

3. It is not essential that notice be given at the outset; notice at a subsequent stage is good notice, if sufficient in other respects.[4]

4. In action proceeding by successive stages, with opportunity offered by law to a person once notified, to keep himself informed, in advance, of succeeding stages, effective notice, at one stage, continues operative for succeeding stages.[5]

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[1]See the succeeding sections.

[2]Roller v. Holly, 176 U. S. 398; S 20:410; L 44:520 (a case of Judicial notice held too short).

[3]Leigh v. Green, 193 U. S. 79; S 24:390; L 48: 623; Grannis v. Ordean, 234 U. S. 385; S 34:779; L 58:1363.

[4]Farrell v. O'Brien, 199 U. S. 89; S 25:727; L 50:101; McMillen v. Anderson, 95 U. S. 37; L 24:335; (Probate of wills without notice, but subject to subsequent notice and opportunity to be heard). So, in effect, Voight v. Detroit, 184 U. S. 115; S 22:337; L 46:459; Goodrich v. Detroit, 184 U. S. 432; S 22:397; L 46:627 (special tax assessment).

[5]Davidson v. New Orleans, 96 U. S. 97; L 24:616; Spencer v. Merchant, 125 U. S. 345; S 8:921; L 31:763; Palmer v. McMahon, 133 U. S. 660; S 10:324; L 33:772; Pittsburgh etc. Ry. v. Backus, 154 U. S. 421; S 14:1114; L 38:1031; Bauman v. Ross, 167 U. S. 548; S 17:966; L 42:270; Pittsburgh etc. Ry. v. Board of Public Works, 172 U. S. 32; S 19:90; L 43:354; Weyerhaueser v. Minne-

This principle ceases to be operative upon the rendering of a judgment strictly and absolutely final on its face.[6]

5. In certain situations, and under certain conditions, persons may be said to be under obligation of being available for notice, and of being constantly on their guard for notice in form capable of actual receipt by them by exercise of reasonable diligence. This may be assumed to be true, in general, of owners of property, in respect of such property.[7]

We may refer, in this connection, to Legislative power to provide for administration—on the theory of death—of a person long and unexplainedly absent and not heard from, for collection by the administrator of credits due the supposed intestate, and for distribution of his property as of a person deceased.[8]

So, the bringing of a garnishment suit may, consistently with Due Process of law, be (or be made) constructive notice to the garnishee's creditor (the principal defendant),[9] even where such principal defendant is not personally within the jurisdiction of the forum of suit.[10]

The principle in question does not extend to independent

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sota, 176 U. S. 550; S 20:485; L 44:583; Gallup v. Schmidt, 183 U. S. 300; S 22:162; L 46:207; King v. Portland, 184 U. S. 61; S 22:290; L 46:431; Voight v. Detroit, 184 U. S. 115; S 22:337; L 46:459; Wilson v. Standefer, 184 U. S. 399; S 22:384; L 46:612; Hodge v. Muscatine County, 196 U. S. 276; S 25:237; L 49:477; Longyear v. Toolan, 209 U. S. 414; S 28:506; L 52:859; Embree v. Kansas City Road District, 240 U. S. 242; S 36:317; L 60:624.

[6]Thus, such a judgment cannot be set aside without new notice. Wetmore v. Karrick, 205 U. S. 141; S 27:434; L 51:745.

[7]See Huling v. Kaw Valley Ry., 130 U. S. 559, 564; S 9:603; L 32:1045: ("It is, therefore"); Wight v. Davidson, 181 U. S. 371; S 21:616; L 45:900; Jacob v. Roberts, 223 U. S. 261; S 32:303; L 56:429; Grannis v. Ordean, 234 U. S. 385; S 34:779; L 58:13:63.

[8]Cunnius v. Reading School District, 198 U. S. 458; S 25:721; L 49:1125; Blinn v. Nelson, 222 U. S. 1; S 32:1; L 56:65. See §§ 229-231.

[9]Herbert v. Bicknell, 233 U. S. 70; S 34:562; L 58:854; Baltimore & O. R. R. v. Hostetter, 240 U. S. 620; S 36:475; L 60:829.

[10]Baltimore & O. R. R. v. Hostetter, cited above.

As to requirement of extra-Judicial notice, inter partes, in Garnishment, see Parties and Privies (§§ 598-600).

extraneous issues only collaterally related to a principal issue in question.[11]

6. Where it is impracticable to reach, directly and specifically, a person entitled to notice, constructive notice is recognized as consistent with Due Process. Common forms of constructive notice are: mail advertisements, posting, and leaving a written notice at the last usual place of abode.[12]

In respect of such notice, general Evidential presumptions are operative.[13]

7. In respect of persons incapable, as matter of law, of receiving actual notice, a representative may be appointed to receive, and to act upon, notice.[14]

8. In a proceeding to adjudge a person non compos mentis, it is sufficient, from the standpoint of Due Process, that written notice be delivered into the hands of such person.[15]

9. The fact that a person, entitled, under general principles, to notice, is, by law, exceptionally debarred temporarily from making actual response to notice, does not dispense with the requirement of notice.[16]

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[11]New York L. Ins. Co. v. Dunlevy, 241 U. S. 518; S 36:613; L 60:1140.

Thus, the owner of land not taken, (in Eminent Domain), but potentially assessable, is not entitled to notice and hearing in respect of the taking and its particulars. St. Louis Land Co. v. Kansas City, 241 U. S. 419; S 36:647; L 60:1072.

[12]Huling v. Kaw Valley Ry., cited above.

[13]E. g., presumptions in favor of receipt of letters. Atherton v. Atherton, 181 U. S. 155; S 21:544; L 45:794.

[14]As, a guardian ad litem, of an infant of whom the Court is competent to acquire jurisdiction. Robinson v. Fair, 128 U. S. 53; S 9:30; L 32:415; Manson v. Duncanson, 166 U. S. 533; S 17:647; L 41:1105; Miedreich v. Lauenstein, 232 U. S. 236; S 34:309; L 58:584: the actual decision, in the latter case, does not go beyond our text; and while other questions were considered, the Opinion (p. 247, ad fin.) rests upon the particular circumstances.

[15]Simon v. Craft, 182 U. S. 427; S 21:836; L 45:1165. Such notice, being sufficient in its direct operation, is sufficient to warrant not merely a lunacy decree, but incidental proceedings, such as a Judicial sale of property of the respondent, as property of a person non compos mentis (case cited).

[16]Dean v. Nelson, 10 Wall. 158; L 19:926; McVeigh v. United States, 11 Wall. 259; L 20:80; Lasere v. Rochereau, 17 Wall. 437; L 21:694; (cases of persons within the Confederate lines, during the

10. Notice, such in form, but not satisfying the requirements of Due Process, is an absolute nullity; and proceedings had under color of it are open to collateral attack for nullity.[17]

11. Uniformity in notice, to different classes of persons interested, is not an essential of Due Process. Notice is subject, in this respect, to the general principles of Equality before the law.[18]

12. In respect of notice, the doctrine De Minimis is applicable.[19]

13. In Procedure for a Contempt committed in the presence of the Court, notice arises from the situation, and jurisdiction attaches at once.[20]

14. Where an indictment, or information, or a written complaint, is required by law, and is presented, in a particular instance, it is to be viewed as the exclusive notice; and the prosecution is limited thereto.[21]

15. The requirement of opportunity to be heard, and of hearing, is, of course, as broad as the requirement of notice.[22]

16. Mere opportunity to file objections, without reasoning in support thereof, is not sufficient.[23]

17. Opportunity to be heard (where right of hearing exists) cannot be hampered by burdensome conditions, or penalties.[24]

Civil War, and debarred by Federal Military orders from entering a State in which the Judicial proceedings in question were proposed to be had).

[17]Dean v. Nelson; McVeigh v. United States; Lasere v. Rochereau; all cited above; Dupasseur v. Rochereau, 21 Wall. 130; L 22:588; Roller v. Holly, 176 U. S. 398; S 20:410; L 44:520.

[18]Ballard v. Hunter, 204 U. S. 241; S 27:261; L 51:461.

[19]Simmons v. Saul, 138 U. S. 439; S 11:369; L 34:1054; (statutory dispensation with notice, in the case of small estates, in administration).

[20]Ex parte Terry, 128 U. S. 289; S 9:77; L 32:405.

[21]Stewart v. Michigan, 232 U. S. 665; S 34:476; L 58:786: (failure of evidence of crime charged; conviction attempted to be sustained on the basis of evidence of another offence, not pleaded).

[22]Central of Georgia Ry. v. Wright, 207 U. S. 127; S 28:47; L 52:134 (invalid limitation of hearing to a part only of the issues).

[23]Londoner v. Denver, 210 U. S. 373; S 28:708; L 52:1103.

[24]Hunter v. Wood, 209 U. S. 205; S 28:472; L 52:747; Journal of Commerce v. Burleson, 229 U. S. 600; S 33:464; L 57:1347; (vir-

Provision may, however, be made for simultaneous trial, in a suit, of two issues: (a) that of the merits; (b) that of reasonable grounds of, and good faith in, a position taken by the losing party; and for judgment in damages upon both issues.[25]

This doctrine in no sense penalizes or burdens the right of resort to Judicial tribunals. It penalizes merely a fraudulent use of a pretence of such right: the right being limited, as matter of definition, to the situation of good faith.

In certain types of situation, in which it is readily competent to an alleged debtor to ascertain the merits of a claim, the doctrine is applicable, with conclusive presumption of bad faith, in cases of unsuccessful defence.[26]

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tually applying the Fifth Amendment); Missouri Pac. Ry. v. Tucker, 230 U. S. 340; S 33:961; L 57:1507: cases of rapidly accumulating penalties pending Judicial determination of rights; and such, in amount, as to be virtually an exclusion from Judicial inquiry. (In Chesapeake & O. Ry. v. Conley, 230 U. S. 513; S 33:985; L 57:1597 the invalidity was negatived by a State interpretation of a State statute as suspended pending Judicial review).

St. Louis, Iron Mtn. etc. Ry. v. Wynne, 224 U. S. 354; S 32:493; L 56:799; (Legislative incompetency to provide for double damages upon refusal to pay an excessive claim).

[25]Thus, in Fraternal Mystic Circle v. Snyder, 227 U. S. 497; S 33: 292; L 57:611, a statute effectually provided, in respect of life-insurance corporations sued upon policies, for a finding (a) upon the merits, and (b) upon good faith in the defence; and, in case of a determination in favor of the insured upon both points, for an increase of judgment by a percentage of the amount of the policy in suit.

[26]Kansas City Ry. v. Anderson, 233 U. S. 325; S 34:599; L 58: 983; (double damages and attorney's fee for cattle-killing and non-payment of the damages).

Missouri, Ks. & Tex. Ry. v. Cade, 233 U. S. 642; S 34:678; L 58: 1135; (State provision for a small attorney's fee, not over $20, upon judgment for plaintiff against a railroad, if just claim not paid within thirty days).

In Gulf, Colorado & S. F. Ry. v. Ellis, 165 U. S. 150; S 17:255; L 41:666; a similar statute was held violative of the Fourteenth Amendment, but upon the ground of violation of the Equal Protection clause of that Amendment, in that it made an arbitrary singling out of railroad corporations. It may be a question whether, even in this view, the case has not been overruled. (See § 498).

18. Refusal or failure to give actual hearing, vitiates and nullifies proceedings under a notice in itself effectual.[27]

19. As in the case of notice, so in the case of hearing, the stage of procedure at which it be given, or had, is not, in and of itself, (as mere matter of Due Process), material. It is sufficient if the hearing be at some stage (of a continuous procedure) at which rights in question may be effectually guarded.[28]

20. Right to a hearing does not include the right to an accurate decision. That is to say, mere error, in a conclusion of law, or of fact, does not vitiate a hearing, from the standpoint of Due Process.[28]

21. Right to notice or to hearing may, in general, be waived.[30]

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[27]Windsor v. McVeigh, 93 U. S. 274; L 23:914; Garnharts v. United States, 16 Wall. 162; L 21:275. (In the latter case it appeared by the record of a judgment—without explanation—that the defendant, appearing and desiring to be heard, was defaulted).

Chicago, Milw. & St. Paul Ry. v. Minnesota, 134 U. S. 418; S 10: 462; L 33:970; Minneapolis Ry. v. Minnesota, 134 U. S. 467; S 10: 473; L 33:985.

As to mob violence, directed against a Court, as vitiation of a hearing, see Frank v. Mangum, 237 U. S. 309; S 35:582; L 59:969.

[28]Thus, a State may provide for a tax "dooming" of a person who has made no return; and it is sufficient that he be entitled to a hearing upon application thereafter made by him (Glidden v. Harrington, 189 U. S. 255; S 23:574; L 47:798). So of distraint for taxes, with opportunity to be heard thereafter (Murray's Lessees v. Hoboken Co., 18 How. 272; L 15:372; Springer v. United States, 102 U. S. 586; L 26:253; Scottish Union etc. Ins. Co. v. Bowland, 196 U. S. 611; S 25:345; L 49:619); and of requirement of payment of a tax assessed, with right of suit for recovery of the amount paid. (Hodge v. Muscatine County, 196 U. S. 276; S 25:237; L 49:477; Dodge v. Osborn, 240 U. S. 118; S 36:275; L 60:557). So, Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S. 510; S 32:535; L 56:863; (hearing before a State Railroad Commission, on questions of discretion; there being given a procedure of Judicial review on matters of law). See, also, Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; S 14: 1047; L 38:1014; Title Guaranty etc. Co. v. Allen, 240 U. S. 136, 141; S 36:345; L 60:566.

[29]In re Converse, 137 U. S. 624; S 11:191; L 34:796; Howard v. Kentucky, 200 U. S. 164; S 26:189; L 50:421; (otherwise, every decision, in law, of a State Court, would be open to Federal Review, as matter of Due Process of Law). See §§ 688-697, as to Federal following of State Judicial Decisions.

[30]Bank of Columbia v. Okely, 4 Wh. 235; L 4:559; Legislative competency to make permissive provision for power of attorney to

22. The definition of hearing involves, in a broad sense, but only in a broad sense, the conception of impartiality of the tribunal.[31]

23. Within reasonable limits, persons may be called upon to demand a hearing, if a hearing is desired.[32]

24. Textual provisions in respect of notice or of hearing, in terms denying the right, are, of course, qualifiable by other law, Written or Unwritten, of the political society in question.[33]

25. Statutory undertaking to make judgment directly binding upon third persons not within the Common Law definition of privies, is denial of notice and hearing to such third persons.[34]

26. Due Process of Law does not require provision of Appellate Procedure, as such.[35]

Consequently, also, provision for such review may be repealed after a controversy arises.[36]

This principle, by its own terms, does not extend to the situation of issues of law arising collaterally before a tribunal (as, an Executive Board) not of legal competency to deal therewith. For such situation, provision for Judicial Review, must evidently be made, answering to the

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promisee, in commercial paper, to confess judgment as against the maker, upon default.

See Allen v. Georgia, 166 U. S. 138; S 17:525; L 41:949; (waiver of State statutory writ of Error, by flight of defendant, in a Criminal case).

[31]The principle does not disqualify a Judge from dealing with a Contempt consisting of libel upon him as being of fraudulent conduct in the cause in question. Patterson v. Colorado, 205 U. S. 454; S 27:556; L 51:879.

[32]Gilfillan v. Union Canal Co., 109 U. S. 401; S 3:304; L 27:977; (bondholders of a corporation; affirmative dissent to re-organization required).

[33]As, by power of a State Court of Equity to relieve against insufficiency of time allowed for certain work required by municipal ordinance of a railroad corporation. Missouri Pac. Ry. v. Omaha, 235 U. S. 121; S 35:82; L 59:157.

[34]See Privies (§§ 599 et seq.).

[35]Ex parte McCardle, 7 Wall. 506; L 19:264; McKane v. Durston, 153 U. S. 684; S 14:913; L 38:867; Andrews v. Swartz, 156 U. S. 272; S 15:389; L 39:422; Hibben v. Smith, 191 U. S. 310; S 24:88; L 48:195. See Louisville & Nashv. R. R. v. Stewart, 241 U. S. 261; S 36:586; L 60:989.

[36]Ex parte, McCardle, cited above.

Common Law provision by Mandamus or Certiorari: otherwise, there would be denial of hearing upon such issues.

27. As far as is consistent with essential protection of rights, provision may be made for representative parties.[37]

28. It is not denial of hearing, to order, pending suit, maintenance of status quo, even where affirmative action is thereby involved; at least where a bond of indemnity, or the like, is provided for.[38]

29. Stay, pending Appeal or Error, is not essential; and lack of success may be penalized by an exceptional rate of interest pending the delay.[39]

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[37]McCaughey v. Lyall, 224 U. S. 558; S 32: 602; L 56: 883; Legislative power to make an administrator a sufficient sole (representative) defendant, in foreclosure.

[38]Omaha etc. Street Ry. v. Interstate Com. Comm., 222 U. S. 582; S 32: 833; L 56: 324; Detroit etc. Ry. v. Michigan R. R. Comm., 240 U. S. 564; S 36: 424; L 60: 802.

[39]Louisville & Nashv. R. R. v. Stewart, cited above.

See, also, § 801 and cases there cited.

PART II.

PRINCIPLES (LARGELY OF UNWRITTEN LAW) OPERATIVE EITHER UPON BOTH FEDERAL AND STATE, OR SOLELY UPON STATE, PROCEDURE.

CHAPTER XCV.

JUDICIAL JURISDICTION.[1]

§ 568. The General Principle.

In respect of Judicial Jurisdiction, Original or Appellate, (a) in the strict sense, and (b) in the looser senses, the Federal law, Organic and non-Organic, adopts the Common Law conceptions, definitions and principles.

§ 569. Certain Elementary Considerations.

It may be proper simply to allude to certain elementary Jurisdictional distinctions.

(1) It is, of course, the first essential of Jurisdiction of a Court (over a certain subject-matter and over certain parties) that the Sovereign under whose authority the Court exists, himself have authority over the subject-matter and over the parties, and power to vest the Jurisdiction in question in the Court. The question of Jurisdiction or absence of Jurisdiction, as dependent upon capacity or absence of capacity in the Sovereign, is matter of Substantive law of Sovereignty, not, properly speaking, of Judicial Jurisdiction; and is, therefore, treated elsewhere, at different points.[2]

(2) The question whether, in a given instance, a Sovereign possessed of capacity has, or has not, vested Jurisdiction in one or in another (or in any) of his Courts, is a matter, not, properly, of Judicial Jurisdiction, but of Interpretation of the statutory or other law of the Sovereign; and absence of jurisdiction, in a given instance, may be due: not (a) to lack of power in the Sovereign, or (b) to lack of compliance with general Jurisdictional essentials, but (c) solely to the fact that the Sovereign in question has chosen not to vest in the Court in question (or perhaps in any of his Courts) the Jurisdiction in question.

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[1]The subject being dealt with from the standpoint of Constitutional or Congressional texts, dealing, in terms, or in substance, (a) with Federal Jurisdiction alone, or (b) with State Jurisdiction as affecting Federal Jurisdiction.

[2]See, particularly, Book III, passim (§§ 213 et seq.).

A situation of this latter class is not infrequently presented by State statutes of Divorce Jurisdiction, textually vesting in the State Courts, Jurisdiction over "residents," so described; intending, however, domiciled inhabitants, only.[3]

(3) Effectual assumption of jurisdiction over certain issues is thereto limited, even where jurisdiction over other issues might have been assumed.[4]

§ 570. The Question of Jurisdiction as Turning upon the Question of Degree of Merits.

A particular Court may have jurisdiction of a particular cause as far as the parties and the generic subject-matter are concerned, but may fail to have jurisdiction by reason of absence of any substantial degree of weight in the contention upon the merits. This situation is, in the Federal Jurisdiction, most commonly presented in dismissal of a cause upon Appeal or Error for lack of jurisdiction by reason of substantial foreclosure, by existing decisions, of a contention of law, relied upon for jurisdiction.[5]

A Federal Court of Original Jurisdiction, however, of any plane, has a corresponding duty.[6]

What is said above, in respect of Jurisdictional contentions in law, is applicable, mutatis mutandis, to Jurisdictional contentions of fact.[7]

§ 571. The Question of Jurisdiction and the Question of Merits as Concurrent.

It may happen, in a particular cause, that a certain situation of fact (alleged or found) presents both the question of jurisdiction, and the question of Merits: with the result that a determination favorable to, or adverse to, the jurisdiction, is likewise favorable to, or adverse to, the Merits; and conversely.[8]

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[3]See Divorce, and cases cited, and Penfield v. Chesapeake, O. & S. W. Ry., 134 U. S. 351; S 10:566; L 33:940.

[4]New York L. Ins. Co. v. Dunlevy, 241 U. S. 518; S 36:613; L 60:1140.

[5]See Federal Question: Foreclosed Question (§ 684, ¶ 2).

[6]Certain of the decisions above referred to, simply adjudge existence of such duty in the lower Federal Court.

[7]See Federal Question.

[8]North American Transp'n Co. v. Morrison, 178 U. S. 262; S 20:869; L 44:1061. In this case, the Jurisdictional question was of

In such situation, the issue of jurisdiction and the issue of Merits are necessarily dealt with concurrently.[9]

§ 572. Jurisdiction as Determinable, in General, as of the Institution of the Suit.—Disappearance, Pendente Lite, of Initial Jurisdictional Conditions:—Persistency of Jurisdiction once Established.

Pursuant to the general Common Law view, jurisdiction, Federal or State, in the strict sense, is in general, determinable, from the Federal point of view, once and for all, as of the moment of institution of suit.[10]

For example, Original jurisdiction at Common Law or in Equity, of a District Court of the United States, continues, notwithstanding disappearance, pending suit, of the essential initial Jurisdictional condition: as, in case of change of State citizenship, terminating initial diversity of citizenship; or in case of disappearance, pending a cause, of a Federal question, initially essential to the jurisdiction.[11]

Amount in Controversy; and that question, and the question of Merits, (in respect of Amount) were, on the plaintiff's pleading, one and the same; and adverse view of the latter question involved adverse decision upon jurisdiction.

Leschen Rope Co. v. Broderick, 201 U. S. 166; S 26:425; L 50: 710); the question of validity of an alleged Federal trade-mark, and the question of the Federal jurisdiction (by Federal question) were one and the same; and decision adverse to the validity of the trademark, as alleged, involved dismissal of the cause for lack of jurisdiction.

Moore v. McGuire, 205 U. S. 214; S 27;483; L 51:776; suit in a Circuit Court of the United States to clear title to land, of a cloud. Venue of such a suit was exclusive in the State rei sitæ. The land was alleged to be in the State of suit. The exact boundary line was not Judicially known to the Federal Judiciary. The question of jurisdiction of the particular Circuit Court, and the question of Merits, (namely situs of the land in the plaintiff's State), were thus one and the same.

So, in effect, Chase v. Wetzler, 225 U. S. 79; S 32:659; L 56:990.

See also, United States v. New South Farm Co., 241 U. S. 64; S 36:505; L 60:890.

[9]As in the cases cited above.

As to the operation, in such situation, of a judgment of dismissal (for absence of jurisdiction), by way of res judicata, in respect of Merits, in a subsequent suit between the parties in a Court having jurisdiction of the Merits, see Collateral Issue; Res Judicata.

[10]See Priority; Original Jurisdiction of the District Courts.

[11]See Federal Original Jurisdiction (Persistency of), (§§721, 759).

So, where one domiciled in, and appointed executor in, one certain State (property in question being there situated), changes his domicil and citizenship to, and personally is in, another State, the jurisdiction of the first State in the Probate proceeding still persists; and the Court may remove him from the executorship, and may charge him personally, in an accounting; and its judgment to that effect is entitled to full Faith and Credit in the second State.[12]

So, of pending Appellate Procedure.[13]

So, mental incompetency of a defendant, arising pending suit, does not defeat the jurisdiction, even as among different political societies.[14]

Persistency of jurisdiction is, however, limited to original issues and necessary incidents.[15]

§ 573. Quasi-Jurisdiction.

A Court before which there has, in form, been initiated a suit not within the scope of jurisdiction of the Court (but within the scope of power of the Sovereign), may, within limits, exercise a quasi-jurisdiction, to such extent as is necessary to avoid injustice, and to neutralize the action thus far taken.

Thus, a Court without actual jurisdiction, may revoke orders improvidently made, so as to restore proper status.[16]

§ 574. No Constitutional Right of Challenge in Limine.

Where a particular Court is competent to take jurisdiction of a certain person named as defendant, if he voluntarily appears; but has not obtained, and cannot, of its

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[12]Michigan Trust Co. v. Ferry, 228 U. S. 346; S 33: 550; L 57: 867.

[13]Nations v. Johnson, 24 How. 195; L 16: 628.

[14]Michigan Trust Co. v. Ferry, cited above.

[15]New York L. Ins. Co. v. Dunlevy, 241 U. S. 518; S 36: 613; L 60: 1140.

[16]Mail Co. v. Flanders, 12 Wall. 130; L 20: 249.

Where a Deputy United States Marshal had, under a writ, valid on its face, but void in law by reason of facts dehors the record, seized and sold, and thus converted into money, certain chattel property as property of the defendant, the Federal Court from which the writ had issued, took jurisdiction of the fund, to the extent of enforcing the defendant's Equitable title to it. Gumbel v. Pitkin, 124 U. S. 131; S 8: 379; L 31: 374.

Where a Federal Bankruptcy Court, in a pending Bankruptcy pro-

own power, obtain, jurisdiction over him; the rights of such person, as against a judgment (such in form) rendered against him, are perfectly preserved (as matter of Federal law) by the nullity of the judgment. Challenge, therefore, by him, in limine, before such Court, of its jurisdiction over him, (not being essential to his rights), is viewed as matter of privilege, and not of strict right; and it is not violative of the Federal Due Process requirement of hearing, for the forum of such Court to impose conditions upon such challenge: as, that of conversion of appearance for challenge of jurisdiction into a general appearance.[17]

§ 575. Collateral Issues.

It is a familiar principle of the Common Law, that a Court of any class, having jurisdiction, in a particular cause, of a principal issue, has, thereby, in general, jurisdiction of such issues (collaterally arising in the progress of the cause) as need to be passed upon for determination of such principal issue, even where the issues so incidentally arising, would, if arising directly, and not incidentally, not be within the jurisdiction of such Court. This principle, in its Common Law definition and particularization, is tacitly adopted into, and is applied by, the Federal Procedure, both (a) as between Federal Courts of generically

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ceeding, wrongfully assumed jurisdiction of a controversy, related to, but not within the scope of, that proceeding, and caused property to be sold, it was competent to the Court, upon ultimately relinquishing jurisdiction, to turn the proceeds, as such, over to another Court having jurisdiction of the controversy. First Bank v. Title & Trust Co., 198 U. S. 280; S 25: 693; L 49: 1051.

Where a certain Federal Court was destitute of jurisdiction of a certain Receivership cause, but in fact proceeded in the cause, costs of the Receivership were held payable out of a fund realized in the proceeding, out of sale of goods. Palmer v. Texas, 212 U. S. 118; S 29: 230; L 53: 435.

Pending an appeal from a decree dismissing a bill for want of jurisdiction, an injunction may be continued for preservation of the status quo pending the appeal. Merrimack River Bank v. Clay Center, 219 U. S. 527; S 31: 295; L 55: 320.

[17]York v. Texas, 137 U. S. 15; S 11: 9; L 34: 604; Kauffman v. Wootters, 138 U. S. 285; S 11: 298; L 34: 962; Western Indemnity Co. v. Rupp, 235 U. S. 261; S 35: 37; L 59: 220.

See § 664, for a more general view.

different classes,[18] and (b) as between a Federal Court and a State Court.[19]

§ 576. Denaturing of Such Issues, in the Federal Original Jurisdiction.

An issue thus collaterally arising in the Federal Original Jurisdiction, loses, for purposes of Procedure, its generic character, and is assimilated, for such purposes, to the principal issue. Thus, an issue of fact, generically of Common Law character, arising collaterally in a Federal Equity suit, is not within the right of trial by jury prescribed for Common Law causes by the Seventh Amendment.[20]

So, in Contempt Procedure, of Criminal character, in a Federal Court, there is no right, under the Fifth Amendment, to trial by jury.[21]

§ 577. Judicial Character or Status:—Court; Judge.

The Federal law adopts, for its various requirements (a) in respect of Federal tribunals or magistracies, and (b) in respect of Foreign or of State tribunals or magistracies (in so far as the Federal law deals therewith), the Common Law conception of Courts of Justice and of Judicial character or status.

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[18]Thus, a Federal Court of Equity, exercising (Federally exclusive) pure Patent jurisdiction, has jurisdiction of Common Law issues incidentally arising (as of title, abandonment, and assignment). Rubber Co. v. Goodyear, 9 Wall. 788; L 19:566; Cawood Patent, 94 U. S. 695; L 24:238; Marsh v. Seymour, 97 U. S. 348; L 24:963.

[19]Pratt v. Paris Gas Light Co., 168 U. S. 255; S 18:62; L 42:458: (competency of a State Court to pass upon a pure Patent issue thus incidentally arising). So, of pure Admiralty issues thus arising in a suit in a State Court. Ibid, 259, ad fin.

[20]Barton v. Barbour, 104 U. S. 126; L 26:672: (see p. 133: "The argument" * * *); Gormley v. Clark, 134 U. S. 338; S 10:554; L 33:909.

[21]See Contempt; Jury Trial.

For instances of issues asserted to be, but held not to be, collateral, see Carey v. Houston & Tex. Centr. Ry., 150 U. S. 170; S 14:63; L 37:1041; Mutual Reserve Ass'n v. Phelps, 190 U. S. 147; S 23:707; L 47:987; H. C. Cook Co. v. Beecher, 217 U. S. 497; S 30:601; L 54:855.

This proposition is illustrated in the classification as of non-Judicial character or status:

(a) of a Judge acting lawfully, but—by consent of parties—in a field outside of his field of duty;[22]

(b) of a Judge acting, by statute (within some certain field) in a ministerial or administrative capacity;[23]

(c) of a Board not vested with Judicial powers;[24]

(d) of arbitrators;[25]

(e) of appraisers, surveyors, certifiers, and the like, acting under statute,[26] or under the terms of a contract.[27]

§ 578. Mingling of Judicial with Legislative Status. It is not uncommon to vest in an official or a Board, primarily of Legislative or Executive powers, or both, Judicial capacity, in a greater or less degree. The States severally—as between a State and the United States—are free to carry such system to any extent.[28]

In the Federal system, only a minor degree of such mingling of capacities is permissible.[29]

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[22]As in the case of a Federal Judge, hearing, by consent, and passing upon, an issue of fact, without a jury, in the absence of authority of law so to act in his official character. In such case, the Judge is a mere arbitrator, and there is no Appellate jurisdiction, even in respect of questions of law involved in his finding. Campbell v. Boyreau, 21 How. 223; L 16:96; Rogers v. United States, 141 U. S. 548; S 12:91; L 35:853; Campbell v. United States, 224 U. S. 99; S 32:398; L 56:684. See Andes v. Slauson, 130 U. S. 435; S 9:573; L 32:989.

[23]E. g., as a licensing magistrate, in a Federal area. See Pacific Whaling Co. v. United States, 187 U. S. 447; S 23:154; L 47:253; United States v. Ferreira, 13 How. 40; L 14:42; United States v. Todd, 13 How. 52, note; L 14:47.

[24]Prentis v. Atlantic Coast Line, 211 U. S. 210; S 29:67; L 53:150; (the orders of such a Board are not judgments, in the legal sense of that term: as, e. g., for the purposes of Error).

[25]Colombia v. Cauca Co., 190 U. S. 524; S 23:704; L 47:1159.

[26]Omaha v. Omaha Water Co., 218 U. S. 180; S 30:615; L 54:991.

[27]Chicago, Santa Fe etc. R. R. v. Price, 138 U. S. 185; S 11:290; L 34:917: finality, under the terms of a railroad contract, of a certificate (as to fulfilment of the contract) of the chief engineer.

The terms, "Court" and "Judge" are, in Federal texts, occasionally used interchangeably, where only Judicial character or status, and not the matter of form of Judicial machinery, is in question. See United States, Pet'r, 194 U. S. 194; S 25:794; L 49:629.

[28]See Republican Form of (State) Government (§ 153).

[29]See Distribution of Powers as Among the Three Branches (§§ 307-311).

Examples of such mingling of functions, in the State field, are seen in the case of certain railroad commissions, and the like, vested with Judicial power.[30]

§ 579. Quasi-Judicial Status.

It may, and constantly does, occur, that there arises collaterally before an Executive Board or Magistrate, Federal or State, an issue of fact, or of law, of Judicial character. In dealing with such an issue, so collaterally arising, such Board or Magistrate possesses Judicial powers, and is of quasi-Judicial character or status.[31]

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[30]As, in Detroit etc. Ry. v. Michigan R. R. Comm., 235 U. S. 402; S 35:126; L 59:288.

[31]See §§ 568 et seq.

CHAPTER XCVI.

Definition of Suit.—Ancillary Suit.[1]

§ 580. The General Principle.

The Federal law adopts, for its various occasions, the Common Law conception and definition of a suit in a Court of Justice, or before a Judicial Magistrate.

The Common Law conception and definition, as Federally adopted, look to substance, and not to form, and, as a result, readily apply themselves to situations of more of less exceptional character.[2]

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[1]Variants: "case"; "proceeding"; "cause"; "controversy", etc.; the subject being dealt with from the standpoint of Constitutional or Congressional texts employing the terms in question.

[2]Examples of suit are: a statutory proceeding in a State Court, against State Tax officials, to enjoin taxation alleged to be invalid (Weston v. Charleston, 2 Pet. 449; L 7:481); a motion for order of dissolution, as unjustified, of a seizure on execution (Klein v. New Orleans, 99 U. S. 149; L. 25:430); a proceeding, in personam, by a State, in a State Court, for recovery of assessed taxes (Southern Pac. R. R. v. California, 118 U. S. 109; S 6:993; L 30:103); a presentation, in a State Probate Court, under statute, of a claim against the estate of a decedent, for allowance (Bristol v. Washington County, 177 U. S. 133; S 20:585; L 44:701: such a proceeding is in character removable to a Court of the United States); a Probate proceeding, asserting jurisdiction in rem over property as of a decedent's estate (Goodrich v. Ferris, 214 U. S. 71; S 29:580; L 53:914); a statutory proceeding for Mandamus, or for Mandatory Injunction, against a carrier, to compel the acceptance of goods, for transit, on certain terms (American Ex. Co. v. Michigan, 177 U. S. 404; S 20: 695; L 44: 823); a statutory proceeding, in a Court, for challenge of the alleged result of a vote of choice of a county-seat (Smith v. Adams, 130 U. S. 167; S 9:566; L 32:895); or for contest over incumbency of a public office (Boyd v. Thayer, 143 U. S. 135; S 12:375; L 36:103: State Governorship); Eminent Domain Procedure, within the Judicial field of that general subject-matter (Traction Co. v. Mining Co., 196 U. S. 239; S 25:251; L 49:462); cases, generally, cited under Eminent Domain.

See, also, under Judicial Character or Status.

Examples of proceedings not within the definition of suit are: State statutory proceeding by Judicial officers, in advance of issue of proposed municipal bonds, to pass upon the validity thereof, if issued; but without binding power in favor of future purchasers of the bonds

§ 581. **Divisibility of a Suit:—Separable Features.**

A proceeding, in itself accurately definable as a suit, may be divisible, to one or to another intent, into a number of distinct suits.[3]

§ 582. **Counter-Suit.**

The Federal law follows the general rules of the Common Law and of Equity, in respect of counter-suits of one or of another class.[4]

The doctrines of this general subject have their most distinctive Federal operation in the field of Jurisdiction of Federal Courts, of one or of another class, and at one or another stage, initial or Appellate. Its operation in such field can be most conveniently discussed from one or another standpoint of Federal Jurisdiction.[5]

§ 583. **A Collateral Issue before an Executive Official, as a Suit.**

From what has been said in the preceding Chapter, of Judicial issues arising collaterally before an Executive official, it follows that such an issue, so arising, is a suit, if the parties concerned choose to treat it as such and to segregate it from the main controversy for Judicial review.

§ 584. **Ancillary Suit.**

The Federal law adopts and follows the Common Law conception and definition of Ancillary suit.[6]

(Tregea v. Modesto District, 164 U. S. 179; S 17:52; L 41:395); statutory appeal from a lower to a higher Taxing Board (Upshur County v. Rich, 135 U. S. 467; S 10:651; L 34:196); an application for an occupation-license, to a Judge, acting in this field, as an Administrative, not as a Judicial, magistrate (Pacific Whaling Co. v. United States, 187 U. S. 447; S 23:154; L 47:253). See Judge; Court.

A proceeding before a United States Commissioner, sitting as a committing magistrate, is a "case", within the general meaning of that term; but it has been viewed as not a "case" within the meaning of a certain Act of Congress (Todd v. United States, 158 U. S. 278; S 15:889; L 39:982).

[3]As, for Removal from a State, to a Federal, Court. See Removal: Separable Controversy.

[4]E. g., to the effect that unliquidated damages are not the subject of set-off, at law. (United States v. Robeson, 9 Pet. 319; L 9:142).

[5]E. g., that of Jurisdictional Amount. See, generally, Set-off and Counter-Suit.

[6]Examples of Ancillary suit are:

Suit in Equity for enforcement or for protection of a decree of

the same Court (Root v. Woolworth, 150 U. S. 401; S 14:136; L 37: 1123; Julian v. Central Trust Co., 193 U. S. 93; S 24:399; L 48: 629; Gunter v. Atlantic Coast Line, 200 U. S. 273; S 26:252; L 50: 477; Kessler v. Eldred, 206 U. S. 285; S 27:611; L 51:1065); or of another Court (Riverdale Mills v. Manufacturing Co., 198 U. S. 188; S 25:629; L 49:1008).

Suit to enjoin (without impeachment of its validity), enforcement of an outstanding judgment (Simms v. Guthrie, 9 Cr. 19; L 3:642; Johnson v. Christian, 125 U. S. 642; S 8:989; L 31:820).

Suit, by a stranger to a pending suit, for protection of his property against an attachment-proceeding in the pending suit (Jones v. Andrews, 10 Wall. 327; L 19:935; Krippendorf v. Hyde, 110 U. S. 276; S 4:27; L 28:145).

Suit, by the plaintiff in a pending suit, to restrain the defendant therein from disposing of property in anticipation of, and in fraud of, the expected judgment in the pending suit (Dewey v. West Fairmont Gas Coal Co., 123 U. S. 329; S 8:148; L 31:179).

CHAPTER XCVII.

PROCEDURE AS CIVIL OR AS CRIMINAL.—AS PENAL.[1]

§ 585. Procedure as Civil or as Criminal.

Illustrative examples of Federal application of the Federally Adopted[2] Common Law differentiation between Civil, and Criminal, Procedure, may be cited as follows:

Habeas corpus, challenging a pending Criminal proceeding, is a Civil proceeding.[3]

Written charges of fraud, filed before a State magistrate of Judicial character, under a State statute, by a judgment creditor against the judgment debtor, in proceedings under execution, leading, upon a finding adverse to the debtor, to imprisonment for a considerable term, are Civil procedure.[4]

A suit by a State, seeking to enjoin individuals against violation of Criminal laws of the State, is, from the standpoint of Federal Jurisdiction, of Criminal character.[5]

We may refer to the distinction between Civil and Criminal aspects of Contempt Procedure.[6]

§ 586. Civil Actions, as Penal, or as Non-Penal.

There is no hard and fast relation between (a) cause of action, and (b) Procedure (as Penal or as non-Penal);

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[1]The subject being material to our field of study principally from the standpoints: (a) of Due Process of Law, in Judicial Procedure; (b) of Faith and Credit to judgments; (c) of Removal; and (d) of power or duty of inter-enforcement of laws as between the United States and a State; and being treated from those and certain other like Federal standpoints only.

[2]§§ 518-522.

[3]Ex parte Tom Tong, 108 U. S. 556; S 2:871; L 27:826.

[4]Stevens v. Fuller, 136 U. S. 468; S 10:911; L 34:461.

[5]Oklahoma v. Atchison, T. & S. F. Ry., 220 U. S. 277; S 31:434; L 55:465; Oklahoma v. Gulf, Colorado & S. F. Ry., 220 U. S. 290; S 31:437; L 55:469.

[6]Bessette v. W. B. Conkey Co., 194 U. S. 324; S 24:665; L 48:997; Matter of Christensen Engineering Co., 194 U. S. 458; S 24:729; L 48:1072; Doyle v. London Guarantee Co., 204 U. S. 599; S 27:313; L 51:641; Gompers v. United States, 233 U. S. 604; S 34:693; L 58:1115.

but, on the contrary, it is competent to Legislative authority to make Procedure optional, as between the two forms.[7]

In the absence of specific Legislative provision, such option is presumed to exist.[8]

While in Penal actions the rules of Civil Procedure prevail, in general,[9] as, those of the necessary degree of preponderance of evidence,[10] and of pleading,[11] nevertheless, Penal Procedure has certain aspects of Criminal Procedure.[12]

As matter of statutory Interpretation, the question may arise, in a given case, whether a pecuniary amount fixed by statute, is fixed as penalty, or merely as liquidated Civil damages.[13]

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[7]Lees v. United States, 150 U. S. 476; S 14:163; L 37:1150; United States v. Zucker, 161 U. S. 475; S 16:641; L 40:777; Schick v. United States, 195 U. S. 65; S 24:826; L 49:99; Hepner v. United States, 213 U. S. 103; S 29:474; L 53:720; United States v. Regan, 232 U. S. 37; S 34:213; L 58:494.

[8]Stockwell v. United States, 13 Wall. 531; L 20:491.

[9]E. g., in respect of ordering a verdict for the plaintiff (Hepner v. United States, cited above); of burden of proof (Lilienthal's Tobacco v. United States, 97 U. S. 237; L 24:901).

[10]United States v. Regan, 232 U. S. 37; S 34:213; L 58:494; (proof beyond a reasonable doubt not necessary).

[11]Locke v. United States, 7 Cr. 339; L 3:364; Clifton v. United States, 4 How. 242; L 11:957; Snyder v. United States, 112 U. S. 216; S 5:118; L 28:697; Coffey v. United States, 116 U. S. 427; S 6:432; L 29:681; 117 U. S. 233; S 6:717; L 29:890; Friedenstein v. United States, 125 U. S. 224; S 8:838; L 31:736.

[12]Boyd v. United States, 116 U. S. 616; S 6:524; L 29:746; Lees v. United States, 150 U. S. 476; S 14:163; L 37:1150 (a Penal action a "criminal case" within the meaning of the Fifth Amendment, in its inhibition of compelling the defendant to be a witness against himself).

[13]Brady v. Daly, 175 U. S. 148; S 20:62; L 44:109; (holding the "damages" (if not less than a certain sum) of the Copyright Act, U. S. Rev. Stats., § 4966, to be Civil damages, not penalty. So of treble damages under the Sherman Act (Chattanoga Foundry v. Atlanta, 203 U. S. 390; S 27:65; L 51:241).

The ordinary form of statutory liability of officers of a corporation, as such officers, is, in the view of the Federal law, not Penal in character. Huntington v. Attrill, 146 U. S. 657; S 13:224; L 36:1123.

For an instance of a suit asserted to be, but held not to be, Penal, see Meeker & Co. v. Lehigh Valley R. R., 236 U. S. 412; S 35:328; L 59:644.

As to the line of distinction—sometimes in question—between Penalty (in form) as Penalty proper, or as Tax, see Taxation, § 361.

§ 587. Persistence of the Differentiation, After and Into, Judgment.

The differentiations above considered are of so fundamental importance that they do not disappear when a cause of action—Civil proper, Penal, or Criminal—goes into judgment; but continue into, and characterize, the judgment; and the judgment may be inquired into from this point of view.[14]

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[14]Wisconsin v. Pelican Ins. Co., 127 U. S. 265; S 8:1370; L 32: 239.

CHAPTER XCVIII.

Procedure In Rem.[1]

§ 588. Prefatory.

As in other fields of Procedure, so in the field of suits in Rem, the Federal law adopts, in general, the Common Law conception and principles; introducing only such modification or specialization as is required by the Federal Political and Judicial system.

Such Federal modification or specialization is dealt with at other points. It is proposed, at the present point, only to present Federal illustrations and applications of general principles not peculiar to the Federal system.

§ 589. Federal Application and Illustration.

Such general principles, in their Federal operation and application, may be summarized and illustrated as follows:

(1) A res is not necessarily corporeal, but may be incorporeal: as, a chose in action;[2] or title, as distinguished from the subject-matter of the title.[3]

(2) Constructive, if not actual, notice to persons interested, is essential to jurisdiction, as against such persons.[4]

(3) Jurisdiction, once acquired, over a corporeal chattel, is not defeated by tortious removal of the chattel from the political area in question.[5]

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[1]The subject being material to our field of study principally from the standpoints (a) of Federal or State power, and (b) of present actual Federal or State Judicial Jurisdiction; and being treated from those and other like Federal standpoints, only.

[2]Wallace v. M'Connell, 13 Pet. 136; L 10:95; Rio Grande R. R. v. Gomila, 132 U. S. 478; S 10:155; L 33:400.

[3]Mellen v. Moline Iron Works, 131 U. S. 352; S 9:781; L 33:178; a title-clearing suit, by a simple (non-judgment) creditor, to set aside a mortgage on property of the debtor.

Citizens' Savings etc. Co. v. Illinois Centr. R. R., 205 U. S. 46; S 27:425; L 51:703: (a suit, by stockholders, for cancellation of burdensome deeds and leases running to the corporation).

Overby v. Gordon, 177 U. S. 214; S 20:603; L 44:741 (see p. 221, ad fin.): Probate and Administration as matter of res.

[4]Dupasseur v. Rochereau, 21 Wall. 130; L 22:588 (foreclosure suit).

[5]Overby v. Gordon, cited above.

(4) Jurisdiction once obtained, by Priority, over a res, extends to incidents: as, in a foreclosure suit, to a question of a title made by the mortgagor pendente lite.[6]

(5) Other things being equal, Priority in exercising jurisdiction over a res, is exclusive.[7]

(6) Jurisdiction may attach upon initiation of a suit.[8]

(7) The general principles of the subject operate in case of statutory Extensions,[9] of Jurisdiction and of Procedure in Rem.[10]

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[6]Stout v. Lye, 103 U. S. 66; L 26:428; Farmers' Loan & Trust Co. v. Lake Street R. R., 177 U. S. 51; S 20:564; L 44:667; (same case, as Lake Street R. R. v. Farmers' Loan Co., 182 U. S. 417; S 21:870; L 45:1161); in a foreclosure suit by a trustee-mortgagee, the res includes (a) a question of Equitable obligation of the trustee; and (b) questions of fitness of the trustee; of wrongdoing by him; and of propriety of his removal from the trust; and separate countersuit on those matters is inadmissible.

[7]Rickey Land etc. Co. v. Miller & Lux, 218 U. S. 258; S 31:11; L 54:1032.

[8]As, upon filing of a bill in Equity. Farmers' Loan & Trust Co. v. Lake Street R. R., cited above.

[9]See Extension (§§ 554-557).

[10]American Land Co. v. Zeiss, 219 U. S. 47; S 31:200; L 55:82 (dealing with broad State title-clearing legislation).

CHAPTER XCIX.

Moot Cases.—Amicable Suits.

§ 590. Prefatory; Definition of Moot Case.

The Federal non-Organic law (and perhaps, by way of Incident, the Federal Organic law, to some extent) adopts the Common Law conception and principles of, and in respect of, moot cases.[1]

A moot case is a case existing as such in form, but presenting no actual Judicial issue.

A given case (a) may be of moot character at and from the outset, or (b) may become of that character, pending its progress. In the former case, it never had a right to a standing in Court; in the latter case, it loses its right to a standing in Court, immediately upon becoming of moot character.

Cases Originally Moot.

Instances of cases moot from their inception, are presented:

1]* where the United States, having no real interest, consents to be made a party plaintiff or defendant, in order to attempt to give Judicial Jurisdiction of a certain issue;[2]

2] or where two persons make a pretended contract, and one of them sues the other upon it, as upon a genuine contract, with the object and view of obtaining a decision upon a question of law;[3]

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[1]Cases generally, cited below, in this Chapter.

*Dark-faced numerals are inserted merely for convenience of reference.

[2]United States v. San Jacinto Co., 125 U. S. 273; S 8:850; L 31:747; United States v. Beebe, 127 U. S. 338; S 8:1083; L 32:121 (suits by the United States purely in the interest of private persons, to test the validity of land patents,—the United States having no title or pecuniary interest).

Muskrat v. United States, 219 U. S. 346; S 31:250; L 55:246; (in which the United States, having no interest, consented to be a defendant in the Court of Claims, to test the Constitutionality of an Act of Congress).

[3]Lord v. Veazie, 8 How. 251; L 12:1067 (writ of Error dismissed, on motion of a third person having an interest in the subject-matter).

3] or, in general, where the suit is a mere contrivance to obtain a decision, without hearing of the persons actually interested;[4]

4] or where the suit is brought collusively to affect adversely third persons interested in the res in question.[5]

Cases Becoming Moot.

Instances of cases not originally moot, but becoming moot, pendente lite, are presented:

5] where one party to a suit becomes a purchaser of the opposing party's interest in the subject-matter, or where, in some other form, the parties compose their differences, with the result of disappearance of actual conflict of interests between them;[6]

6] or where, pending a suit between two corporations, the two corporations have come under one and the same control, with the result of absence of actual conflict of interests;[7]

7] or where a liability, or burden, in controversy (as, that of a tax assessed) is voluntarily paid or satisfied, pending the suit;[8]

8] or where an indictment has been dismissed, and the offence is outlawed;[9]

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[4]Corbus v. Gold Mining Co., 187 U. S. 455; S 23:157; L 47:256; Gaines v. Hennen, 24 How. 553; L 16:770; characterizing (pp. 628, 629) the earlier case of Patterson v. Gaines, 6 How. 550; L 12:553, as fictitious and moot; Cleveland v. Chamberlain, 1 Bl. 419; L 17:93.

[5]Louisville Trust Co. v. Louisville etc. Ry., 174 U. S. 674; S 19:827; L 43:1130; (collusive foreclosure suit, to shut out judgment creditors subordinate to the mortgage).

[6]Wood Paper Co. v. Heft, 8 Wall. 333; L 19:379; San Mateo County v. Southern Pac. R. R., 116 U. S. 138; S 6:317; L 29:589; Tennessee etc. R. R. v. Southern Telegr. Co., 125 U. S. 695; S 8:1391; L 31:853; Buck's Stove Co. v. American Fed. of Labor, 219 U. S. 581; S 31:472; L 55:345; Dakota County v. Glidden, 113 U. S 222; S 5:428; L 28:981: (in the latter case, a new substituted contract was made, pending suit upon an earlier contract).

[7]South Spring Gold Co. v. Amador Gold Co., 145 U. S. 300; S 12:921; L 36:712.

[8]Little v. Bowers, 134 U. S. 547; S 10:620; L 33:1016; Singer Mfg. Co. v. Wright, 141 U. S. 696; S 12:103; L 35:906; California v. San Pablo etc. R. R., 149 U. S. 308; S 13:876; L 37:747.

[9]Lewis v. United States, 216 U. S. 611; S 30:438; L 54:637 (in such situation, Error will not lie to the dismissal of the indictment,

9] or where, pending habeas corpus,—challenging the amount fixed for bail, as excessive—bail is given;[10]

10] or where, in habeas corpus, there is challenged a denial of the writ, on a certain ground; and, pending the habeas corpus proceeding, that ground disappears;[11]

11] or where, pending habeas corpus seeking to prevent deportation of an alien, deportation is actually carried out;[12]

12] or where, pending Appeal or Error, the judgment complained of has been satisfied;[13]

13] or where (in Prohibition) the lower Court has yielded, pending the Prohibition suit,[14]

14] or the proceeding sought to be prohibited has come to an end;[15]

15] or where, pending Error to a Probate Court to effect revocation of administration, the Probate Court admits a will to Probate, and thereby nullifies the administration decree;[16]

16] or where, pending an action against a corporation, the corporation is effectually dissolved, without reservation, express or incidental, of continued existence for the action;[17]

17] or where, pending a suit dealing with an election, the time within which the election might take place has elapsed,[18]

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upon a contention of the defendant of right on his part to a speedy trial,—that question being now a moot one.)

[10]Johnson v. Hoy, 227 U. S. 245; S 33:240; L 57:497.

[11]Fisher v. Baker, 203 U. S. 174; S 27:135; L 51:142; the habeas corpus proceeding being under review, by the Supreme Court, on Error, the question before the Supreme Court became a moot question (p. 181).

[12]Cheong Ah Moy v. United States, 113 U. S. 216; S 5:431; L 28:983.

[13]American Book Co. v. Kansas, 193 U. S. 49; S 24:397; L 48:613.

[14]Jones v. Montague, 194 U. S. 147; S 24:611; L 48:913.

[15]United States v. Hoffmann, 4 Wall. 158; L 18:354; Ex parte Joins, 191 U. S. 93; S 24:27; L 48:110.

[16]Kimball v. Kimball, 174 U. S. 158; S 19:639; L 43:932.

[17]Pendleton v. Russell, 144 U. S. 640; S 12:743; L 36:574. (As to power of such dissolution, as against creditors, see Corporation; Remedy).

[18]Richardson v. McChesney, 218 U. S. 487; S 31:43; L 54:1121.

18] or the election has in fact been held;[19]

19] or where, pending a suit to try title to public office, the term of office expires;[20]

20] or where, pending a suit to invalidate, for the purposes of an impending election, a State Congressional District Act, the election (of a Representative) has de facto taken place, and the House of Representatives has seated the person de facto elected;[21]

21] or where, pending a suit to cancel a revocation of a State permit or license, the term of the license or permit expires;[22]

22] or where a statute (in question only in respect of its operativeness in futuro), has been repealed, pending the suit;[23]

23] or where, pending Federal Error to a State Court, upon a State statute challenged as Federally unconstitutional, the highest Court of the State adjudges the Statute null by reason of inconsistency with the State Constitution;[24]

24] or where proposed action in pais, (in controversy), is made, for the present, impossible, by reason of War.[25]

CERTAIN PARTICULARS.

25] It is immaterial at what stage of a cause the moot character arises; whether, for example, in a State Court or in a Federal Court; in a trial Court or in an Appellate Court. Whenever, and at whatever stage it arises, the case

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[19]Mills v. Green, 159 U. S. 651; S 16:132; L 40:293; unless there be involved questions of permanent future operativeness,—as questions of registration of voters. Giles v. Harris, 189 U. S. 475; S 23:639; L 47:909.

[20]Tennessee v. Condon, 189 U. S. 64; S 23:579; L 47:709.

[21]Richardson v. McChesney, 218 U. S. 487; S 31:43; L 54:1121 (such action of the House being final and conclusive).

[22]Security L. Ins. Co. v. Prewitt, 200 U. S. 446; S 26:314; L 50:545; 202 U. S. 246; S 26:619; L 50:1013.

[23]New Orleans Flour Inspectors v. Glover, 160 U. S. 170; S 16:321; L 40:382; 161 U. S. 101; S 16:492; L 40:632; Dinsmore v. Southern Ex. Co., 183 U. S. 115; S 22:45; L 46:111; Campbell v. California, 200 U. S. 87; S 26:182; L 50:382.

[24]Metzger Motor Car Co. v. Parrott, 233 U. S. 36; S 34:575; L 58:837: (the Federal question being thereby eliminated).

[25]United States v. Hamburg-American Co., 239 U. S. 466; S 36:212; L 60:387.

then, by operation of law, becomes—for the purposes of Federal law—a moot case.[26]

26] So, it is immaterial at what stage the change of character is brought to the attention of the Court.[27]

27] Moot character may exist, or may arise, in respect of one only (or of less than all) of various aspects, stages or issues, presented in the course of a cause. Thus, where a lower Court, being under the duty of hearing, and passing upon, a certain question of law, renders a pro forma judgment, against its own view, and solely for the purpose of effectuating Review (not otherwise to be had) by a higher Court, the issue thus presented (as matter of form) to the higher Court, is a moot issue.[28]

28] Since moot action is opposed to Public Policy, a Court is open to information by any person, and may inform itself in any convenient way; and, being informed, will act without regard to the wishes of the record parties.[29]

29] Where a case becomes a moot case pendente lite, the dismissal of it as such is not necessarily absolute, but is so ordered as to protect all interests.[30]

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[26]As, for example, after argument in the Supreme Court, upon Error to a Federal Court. San Mateo County v. Southern Pac. R. R., 116 U. S. 138; S 6:317; L 29:589; Buck's Stove Co. v. American Federation of Labor, 219 U. S. 581; S 31:472; L 55:345; other cases, generally, cited above in this section.

[27]Ubi supra.

An exceptional situation is presented, in the case of short-term orders of the Interstate Commerce Commission. Expiration of the period of the order, pending Judicial Review, is viewed as not giving moot character to (and, as thereby, not terminating) the Judicial proceeding. Southern Pac. Terminal Co. v. Interstate Com. Comm., 219 U. S. 498; S 31:279; L 55:310. There is here, however, no departure in principle from the general rule; but the practice rests upon a consideration of practical necessity, to the effect that, otherwise, Judicial Review could be defeated, by issue of a succession of short-term orders.

[28]United States v. Gleeson, 124 U. S. 255; S 8:502; L 31:421.

[29]Lord v. Veazie, 8 How. 251; L 12:1067; other cases, generally, cited in this section.

[30]As, for example, (where justice requires that course) by affirmative action of reversal of a judgment under consideration on Appeal or Error, with the object, and the result, of leaving matters in question open to free controversy. South Spring Gold Co. v. Amador Gold Co., 145 U. S. 300; S 12:921; L 36:712.

Where a case, not originally of moot character, may have become,

§ 591. Amicable Suits, for Judicial Determination of Actual Controversies.

It is not essential to legitimacy of a suit that there exist hostility, as between parties; but, on the contrary, parties friendly inter se, but unable to compose their differences (or to compose them satisfactorily) out of Court, may present them for Judicial determination.[31]

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but has not as yet clearly become, of such character, the Court will, in general, and presumptively, proceed with it. Campbell v. California, 200 U. S. 87; S 26:182; L 50:382.

As to suits (perhaps classifiable in strictness, as moot cases) destitute of standing in Court by reason of absence, on the record, of interest, in the plaintiff, see Parties.

See Judgment (by Consent) § 628; Motive and Intent, §§ 780, 781.

[31]Cases cited above.

CHAPTER C.

PARTIES; PRIVIES; QUASI-PARTIES; INTERVENORS:—GENERAL PRINCIPLES.[1]

§ 592. Prefatory:—Scope of the Chapter.

The Federal law has occasion to deal with the matter of Parties, partly from the standpoint of Federal, but partly also from the standpoint of State, Procedure.

To a certain extent, in one or in another portion of the field, the inherent nature of the Federal Political and Judicial system, either absolutely requires, or, as a matter of Federal Policy, leads to, a departure, in some degree, from particulars of the Common Law principles of this field. In general, however, the Federal law, Organic and non-Organic, adopts and follows the Common Law view and the Common Law principles.

It is proposed, in the present Chapter, to illustrate this latter proposition, leaving for consideration elsewhere the Federal departures above referred to, from the Common Law.

§ 593. Limitation of Party Status, to Persons Actually in Interest.

Employing the term "plaintiff" in a broad sense, to designate a party having, at any given stage, or in any given feature of a cause, the initiative, we may say that only those are entitled to be plaintiffs who are concerned in the subject-matter of the controversy.

Thus,—apart from statute (Federal or State, as the case may be)—one not within a class affected by a Legislative enactment, cannot bring suit to challenge its Constitutionality.[2]

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[1]As to Parties, etc., from the standpoint of the Federal Original non-Exclusive Common Law and Equity Jurisdiction, see §§ 734-739.

As to Sovereigns, as Parties, see later Chapters.

[2]Hampton v. St. Louis, Iron Mtn. etc. Ry., 227 U. S. 456; S 33: 263; L 57:596; Stearns v. Wood, 236 U. S. 75; S 35:229; L 59: 475; Mutual Film Corp'n v. Kansas, 236 U. S. 248; S 35:393; L 59: 561.

So, the debtor, in State Insolvency Procedure, cannot challenge a State statute as being void by non-recognition of rights of a certain class of creditors.[3]

So, if a State official, having no personal interest, brings suit, as such State official, in a State Court, against local taxing-authorities, to test and enforce a certain statute increasing local taxes, and the State Courts decide adversely to him, he has no further duty or interest in the matter, and is, thereby, not competent to prosecute Error from the Supreme Court of the United States.[4]

So, a purchaser at foreclosure sale cannot bring suit to challenge a State statute under which the sale was made, as being violative of Due Process as against the mortgagee, if the mortgagee is, under existing circumstances, not in a position to challenge the sale.[5]

§ 594. Shifting Status, as Plaintiff or as Defendant.

Where the original defendant takes on an affirmative position, he becomes, pro tanto, the plaintiff, and the original

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[3]Brown v. Smart, 145 U. S. 454; S 12:958; L 36:773.

[4]Smith v. Indiana, 191 U. S. 138; S 24:51; L 48:125; Braxton County Court v. West Virginia, 208 U. S. 192; S 28:275; L 52:450. So, of a plaintiff in Error, as such, defendant below. Stewart v. Kansas City, 239 U. S. 14; S 36:15; L 60:120.

[5]Hooker v. Burr, 194 U. S. 415; S 24:706; L 48:1046.

To the same general effect are: Owings v. Norwood's Lessee, 5 Cr. 344; L 3:120; Williams v. Hagood, 98 U. S. 72; L 25:51; Marye v. Parsons, 114 U. S. 325; S 5:932; L 29:205; Williams v. Eggleston, 170 U. S. 304; S 18:617; L 42:1047; Tyler v. Judges, 179 U. S. 405; S 21:206 L 45:252; Lampasas v. Bell, 180 U. S. 276; S 21:368; L 45:527; Turpin v. Lemon, 187 U. S. 51; S 23:20; L 47:70; Chadwick v. Kelley, 187 U. S. 540; S 23:175; L 47:293; Davis & Farnum Co. v. Los Angeles, 189 U. S. 207; S 23:498; L 47:778; Smiley v. Kansas, 196 U. S. 447; S 25:289; L 49:546; Hatch v. Reardon, 204 U. S. 152; S 27:188; L 51:415; The Winnebago, 205 U. S. 354; S 27:509; L 51:836; McCandless v. Pratt, 211 U. S. 437; S 29:144; L 53:271; Southern Ry. v. King, 217 U. S. 524; S 30:594; L 54:868; Engel v. O'Malley, 219 U. S. 128; S 31:190; L 55:128; Ex parte Leaf Tobacco Board, 222 U. S. 578; S 32:833; L 56:323; Pittsburg Steel Co. v. Baltimore Soc'y, 226 U. S. 455; S 33:167; L 57:297; Marshall v. Dye, 231 U. S. 250; S 34:92; L 58:206; Hendrick v. Maryland, 235 U. S. 610; S 35:140; L 59:385; McCabe v. Atchison, T. & S. F. Ry., 235 U. S. 151; S 35:69; L 59:169.

plaintiff becomes a defendant. The principle is of constant application in Federal Jurisdiction, as such.[6]

§ 595. Both Parties as Plaintiffs.

It is possible, under statutory procedure, for a situation to arise in which both parties to a case are plaintiffs.[7]

§ 596. Parties, Such to a Limited Intent, Only.

The familiar Common Law principle that one may be a party only to one or to another limited intent, is of frequent Federal application.[8]

§ 597. Parties Not of Record.

The Common Law doctrine that one not a party of record, may, to certain intents, be a party, is Federally applied in the proposition: that where the United States is the plaintiff of record (and, as matter of formal Procedure, properly so), but has no actual interest, the person actually interested is the party plaintiff, from the standpoint of availability of laches or of a Statute or Limitations in defence.[9]

§ 598. Vouching-in of Parties.

Examples of Federal application of the Common Law doctrine in respect of vouching-in new parties are cited in the margin.[10]

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[6]See §§ 686; 791, 792.

[7]Brown v. Gurney, 201 U. S. 184; S 26:509; L 50:717 (a case of so-called "consolidated adverse proceedings" in a State Court, under State statute.)

[8]See United States v. Beebe, 127 U. S. 338; S 8:1083; L 32:121.

[9]United States v. Beebe, cited above.

See Merriam v. Saalfield, 241 U. S. 22; S 36:477; L 60:868.

[10]Where an insurer of an employer, against liability for damages, has undertaken, by its policy, to defend actions, and, in a given instance, has refused to defend, the insured may settle out of Court, and hold the insurer, if the settlement is a reasonable one. St. Louis Beef Co. v. Casualty Co., 201 U. S. 173; S 26:400; L 50:712.

If a carrier from whom goods in question have been seized under process of a Court having jurisdiction, notifies the bailor to defend, and thereupon neither the bailor nor the carrier makes actual defence, an adverse judgment is binding upon the bailor, as between him and the carrier. American Ex. Co. v. Mullins, 212 U. S. 311; S 29: 381; L 53:525; Wells Fargo & Co. v. Ford, 238 U. S. 503; S 35: 864; L 59:1431.

See, to the same effect, Washington Gas Co. v. District of Columbia, 161 U. S. 316; S 16:564; L 40:712 (governed by local law, but illustrative of the general Federal view).

Where the voucher-in (under whatever designation) has no defence to the relief sought as against him, he is under no obligation to maintain a useless defence; but may yield to judgment, with the same protective result in his favor, as between him and the defendant, (his creditor), as if he had made a contest.[11]

Where a Court has obtained jurisdiction over a creditor (as garnishee), but not over the debtor (as defendant), the garnishee must notify the debtor to defend against a judgment in garnishment, if he (the garnishee) would be free from responsibility in the matter.[12]

Where there is no jurisdiction over a garnishee, he must take and press the objection at his own peril; and a (wrongful) adverse decision, and compulsory compliance therewith by him, does not operate in his favor, as between him and the principal parties named.[13]

§ 599. Privies.

Examples of Federal application of the Common Law principles in respect of Privies to a suit are cited in the margin.[14]

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[11]Harris v. Balk, 198 U. S. 215; S 25:625; L 49:1023 (the case of a garnishee who has given due notice to his creditor).

[12]Harris v. Balk, cited above.

A question arising upon principles of vouching-in is, in and of itself, a question of general, not of Federal, law. Bagley v. General Fire Extinguisher Co., 212 U. S. 477; S 29:341; L 53:605.

[13]Chicago, B. & Q. R. R. v. Hall, 229 U. S. 511; S 33:885; L 57:1306.

[14]Clark's Ex'ors v. Carrington, 7 Cr. 308; L 3:354; Lovejoy v. Murray, 3 Wall. 1; L 18:129; (indemnitor as privy to a suit against indemnitee, and bound by the judgment).

Bierce v. Waterhouse, 219 U. S. 320; S 31:241; L 55:237; Washington Ice Co. v. Webster, 125 U. S. 426; S 8:947; L 31:799; (surety a privy to a suit against the principal, and bound by Amendment of the plaintiff's original pleading, up to the amount of the bond).

Souffront v. Compagnie des Sucreries, 217 U. S. 475; S 30:608; L 54:846; (vendees privies to an action brought, even subsequently to the purchase, by the vendors, for the benefit of, and actively maintained by, the vendees, to establish the title conveyed to the vendee). So, Moore v. Huntington, 17 Wall. 417; L 21:642.

Dupasseur v. Rochereau, 21 Wall. 130; L 22:588; (judgment in favor of one mortgagee, as against certain liens, not operative in favor of another mortgagee not a party to the first suit).

The question of presence or absence of privity usually arises as between (a) one claiming to have been, or alleged to have been, a privy, with one party, and (b) the opposing party. It is, however, not necessarily so limited. Thus, when the payee and holder of negotiable paper, void in his hands as between him and the maker, endorses it, for value and without notice, before maturity, to a third person, who recovers judgment thereon, against the maker; the rendering, and the compulsory satisfaction of the judgment, become, thereupon, a valid basis of suit in tort by the maker against the payee.[15]

In such situation, the question of error, in law, on the part of the Court is not material: the controlling fact being the recovery of the judgment.[16]

§ 600. Quasi-Privies:—(Principal and Agent; Trustee and Beneficiary; and the Like).

To certain intents, a principal and an agent, a trustee and a beneficiary, and the like, may, by virtue of their relations, be party and privy, inter se.[17]

United Lines Telegr. Co. v. Boston Trust Co., 147 U. S. 431; S 13: 396; L 37: 231.

Keokuk etc. R. R. v. Scotland County, 152 U. S. 318; S 14: 605; L 38: 457; (mortgagee not a privy to a suit by mortgagor to enjoin against taxes; and thereby not entitled to invoke, in his own favor, a decree rendered in favor of the mortgagor).

Louis v. Brown, 109 U. S. 162; S 3: 92; L 27: 892; (a purchaser of overdue negotiable paper, as in effect a privy, ab initio, to a suit between maker and an earlier holder, resulting in a judgment adverse to the note).

See also Beall v. New Mexico, 16 Wall. 535; L 21: 292; Pittsburgh etc. Ry. v. Loan & Trust Co., 172 U. S. 493; S 19: 238; L 43: 528; Northern Pac. Ry. v. Boyd, 228 U. S. 482; S 33: 554; L 57: 931; Prout v. Starr, 188 U. S. 537, 544; S 23: 398; L 47: 584; Gunter v. Atlantic Coast Line, 200 U. S. 273; S 26: 252; L 50: 477; United Surety Co. v. American Fruit Co., 238 U. S. 140; S 35: 828; L 59: 1238.

[15]Winona etc. R. R. v. Plainview, 143 U. S. 371; S 12: 530; L 36: 191.

[16]Case last cited.

[17]Werlein v. New Orleans, 177 U. S. 390; S 20: 682; L 44: 817. (Where, by State law, a municipal corporation was entrusted with litigation in respect of municipal, or State, character of land, a judgment adverse to the municipal corporation, as party, was binding, adversely to it, in its character of trustee for the State).

Actual, proposing, or possible, customers of a patentee, who prevails in a Patent suit, are quasi-privies with the patentee, in that he may enjoin suit against them, by the party defeated (as an infringer) in the Patent suit.[18]

If one deals with an agent as principal, and a Statute of Limitations bars suit against the agent, it so operates (in the absence of exceptional considerations of justice to the contrary) in favor of the principal.[19]

Within the class of quasi-privies, are persons not parties to a pending suit, but subject, in respect of the suit, to operation of the doctrine of Lis Pendens.[20]

Operation of a Divorce decree upon strangers, falls within the principles applicable to judgments generally. In general, it is operative as to strangers, to the extent of its operation between the parties.[21]

So, in respect of children.[22]

§ 601. Individual Citizens as Potential Privies with the Sovereign, in a Criminal Case.

While, at the Common Law, private citizens are not, in the absence of statute, viewed as privies with the Government in a Criminal prosecution, there seems to be no principle of Federal law forbidding Federal legislation to such effect, within reasonable limits.[23]

§ 602. Quasi-Parties:—Control of Suit.

To one or to another intent, persons who are not in any strict sense parties or privies to a suit, are, where justice

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[18]Kessler v. Eldred, 206 U. S. 285; S 27:611; L 51:1065.

[19]Ware v. Galveston City Co., 111 U. S. 170; S 4:337; L 28:393.

[20]Stout v. Lye, 103 U. S. 66; L 26:428; Scotland County v. Hill, 112 U. S. 183; S 5:93; L 28:692; 132 U. S. 107; S 10:26; L 33:261.

[21]Cheely v. Clayton, 110 U. S. 701; S 4:328; L 28:298; Maynard v. Hill, 125 U. S. 190; S 8:723; L 31:654; German Savings Soc'y v. Dormitzer, 192 U. S. 125; S 24:221; L 48:373.

[22]See Cheever v. Wilson, 9 Wall. 108; L 19:604.

[23]Chantangco v. Abaroa, 218 U. S. 476; S 31:34; L 54:1116 (upholding as valid, a provision of Philippine law making Civil liability of a defendant, (adjudicated in a Criminal cause), decisive of a Civil cause involving the same issues. (The so-called Philippine Bill of Rights embodies a Due Process clause corresponding to that of the Fifth Amendment).

For application of the principles of the present section as between a Sovereign and an official, see § 607.

so requires, viewed as having some right of control over the suit.[24]

Within the class of quasi-parties are persons, not parties to a pending suit, but subject, in respect of a suit, to the doctrine of Lis Pendens.[25]

§ 603. The Situation of Only a Single Party (or Party Group) at Any Stage.

There may exist the situation of a pending suit with only one party (or party group), with no opposing party. This situation exists, for example, where, under statute, one files a bill to clear title to land, as against a non-resident (not served with process) prior to constructive service.

So, a petition for habeas corpus makes a case, or a suit, from the moment of filing of it, although process to the alleged opposing party is denied.[26]

§ 604. Substituted Parties:—New Parties.

The Federal law follows the familiar Common Law principles in respect of substituted parties and new parties: as, in the case of the executor or the administrator of a party dying pending suit; of a newly appointed trustee for creditors under statute;[27] of a creditor joining, after suit brought, in a creditors' bill;[28] of a landlord joining, pendente lite, (in accordance with Federally adopted State

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[24]Thus, where a number of persons collaterally interested in the result of a pending cause, contribute financially to the furtherance of one side or the other, and to expense of counsel, the Supreme Court will not, against their wishes, allow "submission" of the cause by the record parties. Smelting Co. v. Kemp, 103 U. S. 666; L 26: 313.

So, principal and agent may derive rights or burdens, one from the other, according as one or the other is a party. Ware v. Galveston City Co., 111 U. S. 170; S 4: 337; L 28: 393.

For application of the principle as between a Sovereign and an official, see § 607.

[25]As in Scotland County v. Hill, 112 U. S. 183; S 5: 93; L 28: 692; 132 U. S. 107; S 10: 26; L 33: 261.

[26]Ex parte Milligan, 4 Wall. 2; L 18: 281 (where in the Original Court, process to the respondent named is denied, the mere absence, thereby, of an actual respondent, is no answer to claim of Appeal, otherwise permissible).

[27]Houston & Tex. Centr. Ry. v. Shirley, 111 U. S. 358; S 4: 472; L 28: 455.

[28]Stewart v. Dunham, 115 U. S. 61; S 5: 1163; L 29: 329.

practice), as co-defendant, (and as dominus litis), with his tenant, in a possessory action against the tenant.[29]

§ 605. Abatement.

In the absence of Congressional provision, the Federal law adopts the Common Law principles in respect of Abatement by death: as, in the case of a public officer, defendant in Mandamus.[30]

To a certain extent, however, the matter is governed by statute.[31]

§ 606. Intervenors as Parties.

In respect of the status, and of rights, of intervenors, in a pending cause, the Federal law follows the general Common Law principles of the subject.

An intervenor stands as a party to the extent of his intervention.[32]

The stage of intervention is immaterial.[33]

An issue presented by intervention loses its own generic

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[29]Phelps v. Oaks, 117 U. S. 236; S 6:714; L 29:888; Hardenbergh v. Ray, 151 U. S. 112; S 14:305; L 38:93.

See § 737.

[30]United States v. Boutwell, 17 Wall. 604; L 21:721; United States v. Chandler, 122 U. S. 643; L 30:1244; United States v. Lochren, 164 U. S. 701; S 17:1001; L 41:1181; Warner Valley Co. v. Smith, 165 U. S. 28; S 17:225; L 41:621; United States v. Butterworth, 169 U. S. 600; S 18:441; L 42:873.

[31]See Caledonian Coal Co. v. Baker, 196 U. S. 432; S 25:375; L 49:540.

[32]As, a non-resident creditor voluntarily appearing in a State Insolvency proceeding. Clay v. Smith, 3 Pet. 411; L 7:723.

[33]Kneeland v. American Loan Co., 136 U. S. 89; S 10:950; L 34:379; (a successful bidder at a Judicial foreclosure sale becomes a party to the foreclosure suit, and subject, thereby, to compulsory process therein).

Cable v. Ellis, 110 U. S. 389; S 4:85; L 28:186; (where, by State Procedure law, one buying into a pending suit may intervene, he takes the suit as he finds it, and comes in, as a party, cum onere: as, in respect of a Federal Removal period, already expired).

See, also, Secombe v. Steele, 20 How. 94; L 15:833; Bank v. Turnbull, 16 Wall. 190; L 21:296; Van Norden v. Morton, 99 U. S. 378; L 25:453; New Orleans v. Construction Co., 129 U. S. 45; S 9:223; L 32:607; Mellen v. Moline Iron Works, 131 U. S. 352; S 9:781; L 33:178; Kohn v. McNulta, 147 U. S. 238; S 13:298; L 37:150; Laing v. Rigney, 160 U. S. 531; S 16:366; L 40:525; Guardian Trust Co. v. Fisher, 200 U. S. 57; S 26:186; L 50:367; Gunter v. Atlantic Coast Line, 200 U. S. 273; S 26:252; L 50:477; Shulthis v. McDougal, 225 U. S. 561; S 32:704; L 56:1205.

character, and becomes assimilated, for Procedure purposes, to the principal suit. Thus, if the owner of a Common Law chose in action elects to intervene in a Receivership suit, his right under the Seventh Amendment, to Common Law Procedure, disappears, and the Procedure upon his claim is Equitable, and he has no right to jury trial; and, if issues are framed, the verdict of a jury is merely instructive to the Court, and is not final.[34]

So, the citizenship of an intervenor is immaterial for the purposes of Federal Jurisdiction by citizenship.[35]

§ 607. **Sovereign and Official as Privies.**

1. A Sovereign, party to a suit, may (a) derive rights therein, or (b) be under burdens therein, by derivation from an official (not party to the suit) of such Sovereign. Thus, where, by State law, a Statute of Limitations had run, in favor of officers of the United States as individuals; and would, as between them and others, claiming land in question, operate to establish title, it had such operation derivatively, in favor of the United States.[36]

2. So, conversely, where the official, not the Sovereign, is party to a suit. Thus, where a seizure of a vessel is made in fact, and is adopted by the Sovereign of the one making the seizure, a Prize decree, adverse to the seizure, is conclusive, in favor of the owner, in a suit by him against the individual de facto seizor.[37]

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[34]Kohn v. McNulta, cited above.

See also, Collateral Issue, (§§ 575, 576).

[35]§§ 722, 737.

[36]Stanley v. Schwalby, 147 U. S. 508, 519; S 13:418; L 37:259; 162 U. S. 255; S 16:754; L 40:960.

[37]Gelston v. Hoyt, 3 Wh. 246; L 4:381; a judgment adverse to the United States, in a Federal District Court, upon seizure and libel for condemnation of a vessel, held conclusive, as res judicata, in favor of the owner (the claimant in the seizure case) in a subsequent suit by him, in trespass, in a State Court, against the Federal officers who made the seizure—the issues being the same, in the earlier as in the later suit. (As to identification of the officers with the United States, for the purposes of res judicata, see other citations, elsewhere, of the case).

United States v. Baltimore & O. R. R., 229 U. S. 244; S 33:850; L 57:1169; (a judgment on the merits, in a Federal Court, adverse to the United States, in a suit in Equity by the United States against a private defendant, held res judicata, in favor of the private party, in a Criminal prosecution subsequently brought by the United States, raising the same issues).

CHAPTER CI.

Borrowed Forms of Procedure.[1]

§ 608. The Subject Generally.

One or another certain head of Substantive law is, in many instances, given, by statute, (Federal or State), for certain purposes, a form of Procedure borrowed from some other head of Substantive law of fundamentally different character. In such case, the borrowed form does not alter the intrinsic character of a given proceeding, but is a mere external feature.

Thus, a suit in Rem, under an Act of Congress, for condemnation and forfeiture of land, or of chattels not within the Admiralty Jurisdiction, is, notwithstanding its Admiralty form, a Common Law action, to be tried on the Common Law side, with a jury; and the Appellate jurisdiction of the Supreme Court (as in Common Law cases in general) is by Error, not Appeal.[2]

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[1]The subject being material to our field of study primarily and chiefly from the standpoints: (a) of Due Process of Law in respect of Judicial Procedure; (b) of Federal or State Judicial Jurisdiction; and (c) of power or duty of inter-enforcement of laws, as between the United States and a State; and being here briefly considered from those and other like Federal standpoints only.

[2]The Sarah, 8 Wh. 391; L 5:644; Union Ins. Co. v. United States, 6 Wall. 759; L 18:879; Armstrong's Foundry, 6 Wall. 766; L 18:882; Morris's Cotton, 8 Wall. 507; L 19:481; Graham, Ex parte, 10 Wall. 541; L 19:981; United States v. Winchester, 99 U. S. 372; L 25:479; Hipolite Egg Co. v. United States, 220 U. S. 45; S 30: 364; L 55:364; Four Hundred and Forty-three Cans of Egg Product v. United States, 226 U. S. 172; S 33:50; L 57:174.

CHAPTER CII.

THE COMMON LAW DOCTRINE OF IMMUNITY OF A SOVEREIGN FROM DIRECT ADVERSE SUIT:—FEDERAL ADOPTION:—APPLICATION TO THE STATES AND TO FEDERAL STATES.

§ 609. General View.

1. At the Common Law, a Sovereign is not subject to direct adverse private suit.

2. In respect of suit against the United States, the text of the Constitution makes no textual mention of the subject. The Common Law doctrine, however, is, to this intent, adopted.[1]

The Immunity of the United States from suit extends to suit by a State,[2] even where, in a suit between two States, the United States is, under general principles relating to parties, a necessary party.[3]

3. The Constitution makes no provision for Federal Jurisdiction of suit against a State by a citizen of the State; and, in consequence, there is (by force of the silence of the Constitution) no such Jurisdiction.[4]

4. The Constitution, in its original text, provided in terms for Federal Judicial Jurisdiction of suits textually described as controversies "between a State and citizens of another State," and "between a State and foreign States, citizens or subjects." This language was capable of an interpretation of Federal Jurisdiction of suit against a State by a private person, citizen of another State or of a Foreign nation; and this interpretation was adopted.[5]

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[1]United States v. M'Lemore, 4 How. 286; L 11:977; Hill v. United States, 9 How. 386; L 13:185; Kansas v. United States, 204 U. S. 331; S 27:388; L 51:510.

[2]Florida v. Georgia, 17 How. 478; L 15:181.

[3]Case last cited.

[4]Smith v. Reeves, 178 U. S. 436; S 20:919; L 44:1140; Murray v. Wilson Co., 213 U. S. 151; S 29:458; L 53:742.

[5]Oswald v. New York, 2 Dal. 402; L 1:433; 2 Dal. 415; L 1:438; Georgia v. Brailsford, 2 Dal. 415; L 1:438; Chisholm v. Georgia, 2 Dal. 419; L 1:440.

Immediately, however, after the establishment, by the cases cited, of this interpretation, the Eleventh Amendment was adopted.[6]

This Amendment took operation, not merely in respect of then future suits, but upon suits pending at the time of its adoption,[7] and, therefore, upon then existing claims, not as yet in suit, against a State.

It operated to qualify or to repeal more general texts of the Constitution literally to the contrary; as: the provision in the Judiciary Article in respect of Federal Jurisdiction of suits involving Federal question.[8]

5. The Constitution does not deal in terms with liability of a State to suit by the United States; but the text (of the Judiciary Article), "to controversies to which the United States shall be a party", is viewed as vesting Federal Jurisdiction of such suits.[9]

6. In the establishment, in Federal area, of Federal States, Congress has broadly treated such States, in general, as quasi-nations;[10] and Congress is presumed to intend (as an Incident of its such policy) extension to the Federal States, in general, of the Common Law doctrine of Immunity from private suit,[11] except where, and in so far as, Congress treats a particular Federal State as a municipal corporation.[12]

7. The fact that in respect of a subject-matter in question, a Sovereign is, as Sovereign, a trustee, does not, in and of itself, negative or qualify the Immunity from suit: as,

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[6]The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

[7]Hollingsworth v. Virginia, 3 Dal. 378; L 1:644; Chisholm v. Georgia, (cited above), at p. 480, note.

[8]Hans v. Louisiana, 134 U. S. 1; S 10:504; L 33:842.

[9]United States v. North Carolina, 136 U. S. 211; S 10:920; L 34:336; United States v. Texas, 143 U. S. 621; S 12:488; L 36:285.

[10]See Federal States.

[11]Kawananakoa v. Polyblank, 205 U. S. 349; S 27:526; L 51:834; Porto Rico v. Rosaly, 227 U. S. 270; S 33:352; L 57:507.

[12]Metropolitan R. R. v. District of Columbia, 132 U. S. 1; S 10:19; L 33:231. See District of Columbia.

where the United States, under an Indian Treaty, holds property for an Indian Tribe.[13]

§ 610. Definitory Qualification of the Doctrine:—Liability to Counter-Suit:—Waiver of Immunity by Bringing of Suit.

In adopting the Common Law principle in question, the Federal Organic law adopts the principle as it stands at the Common Law, with its Common Law definitory qualifications. Such qualifications may be particularly considered as follows:—

(1) Liability to Counter-Suit.—Immunity from suit does not extend to, but is deemed to be waived in respect of, counter-suit, in a suit brought by a Sovereign. Thus, where a Foreign nation brought suit in a Federal Court, seeking to have a certain non-Judicial arbitration award (between the plaintiff nation and a private corporation) declared invalid, the defendant was allowed to maintain a cross-bill for affirmation of the award, and a money judgment was rendered thereon, in favor of the corporation, for the amount of the award.[14]

So, where a vessel was captured, as a Prize, in favor of the United States, and, while on her way, in charge of a Prize crew, to a Federal port of adjudication, committed a Maritime tort; and the United States adopted the seizure by instituting a Prize suit, the owners of the injured vessel were entitled, after Prize adjudication, and sale, to file a petition, and to enforce their Maritime lien, against the proceeds (held in the Registry of the Prize Court).[15]

So, where the United States is under necessity of appearing, and appears, as a claimant of chattels of its own, in respect of which salvage service has been rendered, a judgment of lien for the salvage may be entered by the Court in whose possession the chattels are.[16]

(2) Waiver by Intervention.—Immunity is deemed to be waived by (and to the extent of) intervention by a Sov-

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[13]United States v. Nashville etc. Ry., 118 U. S. 120; S 6:1006; L 30:81.

[14]Colombia v. Cauca Co., 190 U. S. 524; S 23:704; L 47:1159.

[15]The Siren, 7 Wall. 152; L 19:129.

[16]The Davis, 10 Wall. 15; L 19:875.

See also United States v. Robeson, 9 Pet. 319; L 9:142.

ereign, in a suit (between private parties) not characterizable as a suit by or against such Sovereign. Thus, a Sovereign so intervening, is not at liberty to withdraw his intervention,[17] and is bound by the judgment therein.[18]

(3) Waiver by Voluntary Submission to Direct Suit in the Strict Sense of the Term "Suit."—It is competent to a Sovereign to waive his Immunity from direct suit, in the strict sense of that term,[19] (and, pro tanto, to vest jurisdiction in a Court proper) by voluntary submission to direct suit,[20]—defining, qualifying, and conditioning the submission and waiver, at pleasure: as, by limiting the consent, to suit in the Sovereign's own Courts.[21]

(4) Procedure, in General, in Counter-Suit or Intervention.—In such counter-suit or intervention procedure, the Sovereign, (under existing Federal Judiciary legislation) is, in general, up to, and including, the judgment, upon the footing of a private suitor, both favorably to, and adversely to, himself. Thus, on the one hand, set-off, by the defendant, is subject to the general Common Law limitations in respect of character of set-off claims;[22] while, on the other hand, the Sovereign has only such right to Appeal or Error as a private plaintiff or intervenor would have.[23]

§ 611. The Question of Enforcement (in Case of Such Waiver) of Judgment Against a Sovereign.

We have considered and illustrated, in the preceding section, the principle that where, or in so far as, a judgment may be, and is, rendered against a Sovereign, and is capable of direct operation, it has such operation; and that it is entitled to satisfaction out of, or of affirmative enforcement

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[17]Porto Rico v. Ramos, 232 U. S. 627; S 34:461; L 58:763.

[18]Gunter v. Atlantic Coast Line, 200 U. S. 273; S 26:252; L 50:477.

[19]As to mere (quasi-Judicial) accounting procedure, see § 620.

[20]Smith v. Reeves, 178 U. S. 436; S 20:919; L 44:1140.

[21]Case last cited: (limitation of consent, by a State, to suit in a Court of the State).

So, see Carolina Glass Co. v. South Carolina, 240 U. S. 305; S 36:293; L 60:658.

[22]United States v. Robeson, 9 Pet. 319; L 9:142.

[23]United States v. Thompson, 93 U. S. 586; L 23:982.

against, property or other res within the control of the Court rendering the judgment.

Where, however, a judgment cannot be thus effectuated, (as, in the case of a set-off judgment in excess of the claim of the Sovereign), execution cannot issue;[24] but the judgment is, pro tanto, merely declaratory.[25]

§ 612. Definition of a Suit, as Being, or as not Being, a Suit Against a Sovereign.

SUIT AGAINST SOVEREIGN.

Typical classes of suits definable as suits against a Sovereign are as follows:—

1]* Mandamus or the like against an Executive official in respect of action not purely ministerial, but involving exercise of discretion or delegated Judicial authority;[26]

2] Suits brought against public officials, as individuals, but closely involving interests of the Sovereign of such officials.[27]

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[24]United States v. Eckford, 6 Wall. 484; L 18:920.

[25]See Carolina Glass Co. v. South Carolina, cited above.

*Dark-faced numerals are inserted merely for convenience of reference.

[26]Louisiana v. Jumel, 107 U. S. 711; S 2:128; L 27:448; North Carolina v. Temple, 134 U. S. 22; S 10:509; L 33:849; New York Guaranty Co. v. Steele, 134 U. S. 230; S 10:511; L 33:891; Smith v. Reeves, 178 U. S. 436; S 20:919; L 44:1140; Oregon v. Hitchcock, 202 U. S. 60; S 26:568; L 50:935; Naganab v. Hitchcock, 202 U. S. 473; S 26:667; L 50:1113; Louisiana v. Garfield, 211 U. S. 70; S 29:31; L 53:92; Murray v. Wilson Co., 213 U. S. 151; S 29:458; L 53:742; Louisiana v. McAdoo, 234 U. S. 627; S 34:938; L 58:1506.

[27]Governor of Georgia v. Madrazo, 1 Pet. 110; L 7:73; Cunningham v. Macon etc. R. R., 109 U. S. 446; S 3:292; L 27:992, (foreclosure suit against the Governor and others, seeking, inter alias res, a Judicial determination of invalidity of a certain mortgage held by the State, with color of title).

Hagood v. Southern, 117 U. S. 52; S 6:608; L 29:805 (suit against State officials, to compel receipt by them of State scrip in satisfaction of taxes).

In re Ayers, 123 U. S. 443; S 8:164; L 31:216 (suit in a Court of the United States against officers of a State, to enjoin a mere Civil suit for taxes).

Belknap v. Schild, 161 U. S. 10; S 16:443; L 40:599; International Postal Supply Co. v. Bruce, 194 U. S. 601; S 24:820; L 48:1134; (suits to enjoin further use, by officers of the United States, of certain corporeal chattels, in actual use by the United States,

SUIT NOT AGAINST SOVEREIGN.

Typical classes of suits definable as not being suits against a Sovereign are as follows:

3] Mandamus against an Executive official, in respect of action of purely Ministerial character;[28]

4] Suits against Executive officials (under certain conditions) to enjoin institution or maintenance of legal proceedings or proceedings in pais, under State law alleged to be violative of Federal law;[29] such suits are, naturally, brought in Courts of the United States; but such a suit may, as matter of Federal right, be brought in a Court of the State in question;[30]

5] Suit against a municipal corporation;[31] or a quasi-municipal corporation;[32]

6] Suit affecting rights or interests of the Sovereign, but only in a manner or to a degree of small practical importance;[33]

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through such officers, as governmental instrumentalities).

Chandler v. Dix, 194 U. S. 590; S 24:766; L 48:1129: suit against officers of a State to enjoin enforcement of a tax title, held by the State, with color of validity.

Lankford v. Platte Iron Works, 235 U. S. 461; S 35:173; L 59: 316; (suit against a State Banking Board, to enjoin enforcement of State statute).

Union Trust Co. v. Southern Nav. Co., 130 U. S. 565; S 9:606; L 32:1043, would seem to have been a case of the class above considered; but the point was not raised.

Carolina Glass Co. v. South Carolina, 240 U. S. 305; S 36:293; L 60:658; (an attempt to reach specific assets of the State).

[28]Union Pac. R. R. v. Hall, 91 U. S. 343; L 23:428; Lower v. United States, 91 U. S. 536; L 23:420.

[29]§§ 437-443; 715-717; many cases cited throughout Book V.

[30]General Oil Co. v. Crain, 209 U. S. 211; S 28:475; L 52:754. As to the general principle, see § 657.

[31]Cowles v. Mercer County, 7 Wall. 118; L 19:86; Crampton v. Zabriskie, 101 U. S. 601; L 25:1070; Chicot County v. Sherwood, 148 U. S. 529; S 13:695; L 37:546; Graham v. Folsom, 200 U. S. 248; S 26:245; L 50:464; Metropolitan R. R. v. District of Columbia, 132 U. S. 1; S 10:19; L 33:231.

[32]Hopkins v. Clemson College, 221 U. S. 636; S 31:654; L 55: 890; National Volunteer Home v. Parrish, 229 U. S. 494; S 33:944; L 57:1296.

[33]Stanley v. Schwalby, 147 U. S. 508; S 13:418; L 37:259; 162 U. S. 255; S 16:754; L 40:960. In this case, private persons claiming title and right of possession of the Arlington Cemetery (in

7] Suit against a corporation, part of the capital stock of which is owned by a State;[34]

8] Suit against a public officer, in the absence both (a) of color of public title or authority, and (b) of any claim of right, by the Sovereign.[35]

This doctrine extends not merely to specific articles of property capable of ear-marking, but to an increment made, without color of right, to the general funds and assets of the Sovereign.[36]

9] Within this category fall the familiar class of actions against officials sued as individuals, in respect of acts committed outside the sphere of their authority,—no interest of the Sovereign in question being directly or indirectly involved in a manner adverse to the Sovereign.[37]

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possession of the United States) sued, in Ejectment,—in a State Court, and, upon Removal, in a Court of the United States—agents of the United States in physical charge of the estate. The case was held to be not a case against the United States. It is to be observed that while the result of a judgment for the plaintiffs would put the United States to the inconvenience of putting in new care-takers, it would have no other or further operation against the United States (the United States not being a party); and the risk of such a degree of mere inconvenience was held to be negligible.

So, United States v. Lee, 106 U. S. 196; S 1:240; L 27:171; Brown v. Huger, 21 How. 305; L 16:125; Grisar v. McDowell, 6 Wall. 363; L 18:863; Tindal v. Wesley, 167 U. S. 204; S 17:770; L 42:137.

[34]Bank of the United States v. Planters' Bank, 9 Wh. 904; L 6:244.

[35]Slocum v. Mayberry, 2 Wh. 1; L 4:169. An Act of Congress had provided for seizure of vessels, but (explicitly) not of cargo. A Federal official having made seizure of vessel and cargo, his possession of the cargo was without color of authority; and, as a result, it was competent to the owner of the cargo to replevy it from him, and even in a State Court.

Poindexter v. Greenhow, (Virginia Coupon Cases), 114 U. S. 270; S 5:903; L 29:185. In this case, a State tax collector, acting under a Federally unconstitutional State statute, distrained, for taxes, a corporeal chattel of the plaintiff. The plaintiff maintained replevin against him, in a State Court. (See p. 282, ad fin.).

[36]Osborn v. United States Bank, 9 Wh. 738; L 6:204; United States v. State Bank, 96 U. S. 30; L 24:647.

[37]Little v. Barreme, 2 Cr. 170; L 2:243; Teal v. Felton, 12 How. 284; L 13:990; Mitchell v. Harmony, 13 How. 115; L 14:75; Bates v. Clark, 95 U. S. 204; L 24:471.

§ 613. Mere Defence, by a Public Law Officer, of a Public Official.

Mere appearance for, and defence of, a public official (lawfully made a defendant) by a public law officer of a Sovereign in question, does not make the Sovereign a party to the suit.[38]

§ 614. Suit between Private Parties upon Public Issues.

We may, in this connection, observe: that (since a Sovereign cannot be made a defendant unless by his own consent, and so cannot be bound by a judgment rendered between him and private litigants), private persons may, between themselves, litigate public issues collateral to private issues: as, an issue of the true location of a State boundary-line,[39] or an issue of title (as between such private parties) to land actually in possession of, and in use by, the United States for public purposes,—the United States being in no way open to injury or to inconvenience by the decision.[40]

§ 615. A Sovereign as a Necessary Defendant:—Failure Thereby of Jurisdiction.

The general rules of law as to strictly necessary defendants apply to a Sovereign as to a private person. That is to say, if the Sovereign would be a strictly necessary defendant but for his Sovereign character, he is no less a necessary defendant because of that character; with the result that a proposing plaintiff as to whom a given Sovereign is immune from suit, may be completely barred from suit, by reason of the Immunity of the Sovereign.[41]

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[38]United States v. Lee, 106 U. S. 196; S 1:240; L 27:171; Carr v. United States, 98 U. S. 433; L 25:209; Hussey v. United States, 222 U. S. 88; S 32:33; L 56:106.

[39]Handly's Lessee v. Anthony, 5 Wh. 374; L 5:113; Wilcox v. Jackson, 13 Pet. 498; L 10:264; Howard v. Ingersoll, 13 How. 381; L 14:189; Jones v. Soulard, 24 How. 41; L 16:604.

[40]Meigs v. M'Clung's Lessee, 9 Cr. 11; L 3:639.

[41]Christian v. Atlantic etc. R. R., 133 U. S. 233; S 10:260; L 33:589; Chandler v. Dix, 194 U. S. 590; S 24:766; L 48:1129.

§ 616. **Divisibility of the Subject-Matter of a Suit:—Sovereign a Necessary Party Defendant only in a Separable Part of the Controversy.**

Where the necessity of presence of the Sovereign as a party extends only to part of the whole field of subject-matter of a controversy, the Courts will, as far as may be, deal with the rest of the field.[42]

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[42]Thus, where a Federal State (immune from suit) acquired a part of a tract of land that was subject to a single mortgage, a foreclosure suit was maintained against the owners of the rest of the tract, and a judgment was entered, of sale of such latter parcel, with a personal judgment against such owners for any unsatisfied portion of the mortgage debt. Kawananakoa v. Polyblank, 205 U. S. 349; S 27:526; L 51:834. This disposal of the matter threw the whole burden of the possible shortage of proceeds of sale upon the private owners, without regard to equities between them and the Federal State. This result is, it would seem, relieved from the charge of undue harshness, only by the doctrine of presumptive readiness of a Sovereign or a quasi-Sovereign promptly to fulfil his pecuniary obligations: a presumption bearing, in the case in question: (a) upon the Federal State and (b) upon the United States, as the ultimate Sovereign.

CHAPTER CIII.

SUIT BY A SOVEREIGN:—APPLICATION TO THE UNITED STATES, TO A STATE, OR TO A QUASI-SOVEREIGN FEDERAL STATE.

§ 617. The General Principle.

In the view of the Common Law, there is nothing in the status of Sovereignty inconsistent with a Sovereign's appearing as a party plaintiff in a Civil suit, either in his own Courts, or in the Courts of other Powers; the only difference being: that a Sovereign appears in his own Courts as matter of right, but in a Foreign Court, only by Comity.[1]

It may be assumed that, to this intent, a State is not foreign to the United States, and that the United States may enter a State Court as matter of right, obtaining not merely as between the United States and private parties,[2] but also as between the United States and the States.

The Constitution in terms provides for entry of a State as plaintiff into the Original Jurisdiction of the Supreme Court.[3]

§ 618. Definition of a Suit as Being, or not Being, a Suit by a Sovereign.

The definition of a suit as being, or as not being, a suit by a Sovereign, proceeds by Substance, not by Form. Certain leading principles of definition may be summarized as follows:—

(1) Where a Sovereign is plaintiff of record, and has, of record, as Sovereign, a direct pecuniary interest, or other title-interest, in the subject-matter of the suit, the suit is

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[1]As in The Sapphire, 11 Wall. 164; L 20:127; (suit in a Federal Admiralty Court by a Foreign Sovereign).

[2]United States v. Ansonia Brass Co., 218 U. S. 452; S 31:49; L 54:1107; (in which the United States intervened as claimant in a State suit in rem).

[3]Judiciary Article. See cases cited in the following section, and, generally, Original Jurisdiction of the Supreme Court.

definable as a suit by the Sovereign.[4] Interest as Parens Patriæ is sufficient to this result.[5]

(2) Where the Sovereign is the record plaintiff, but, upon the record, the whole actual interest is in a private individual, (not plaintiff of record), the suit is not, in law, a suit by the Sovereign.[6]

(3) Where suit is brought in the name of an official (or a corporate instrumentality) of a Sovereign, the question of definition of the suit, (as being, or as not being, a suit by the Sovereign), turns upon the underlying question of actual beneficial interest, or absence of interest, in the subject-matter of the controversy, on the part of the Sovereign.[7]

(4) A suit by, and in the name of, a private person, natural or artificial, to enforce a grant of a franchise (as,

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[4]Pennsylvania v. Wheeling Bridge, 13 How. 518; L 14:249; 18 How. 421; L 15:435.

[5]Georgia v. Tennessee Copper Co., 206 U. S. 230; S 27:618; L 51:1038; (a State is Parens Patriae, in respect of protection of State area from nuisance originating in another State, and may, thereby, as a State maintain, in the Supreme Court, against private persons, a suit to enjoin against the nuisance).

[6]Maryland v. Baldwin, 112 U. S. 490; S 5:278; L 28:822; (suit on an administration bond running to a State); Curtner v. United States, 149 U. S. 662; S 13:985; L 37:890; (the United States a purely formal party); Indiana v. Glover, 155 U. S. 513; S 15:186; L 39:243; (suit in a purely private interest, upon the official bond—running to the State—of a municipal official).

New Hampshire v. Louisiana, 108 U. S. 76; S 2:176; L 27:656; incapacity of a State, as mere legal owner, upon a dry trust, for certain of its citizens, to bring suit against a sister State (the alleged debtor) in the Supreme Court. In contrast with this case is South Dakota v. North Carolina, 192 U. S. 286; S 24:269; L 48:448, in which both legal and equitable (beneficial) title in a chose of action against the defendant State, had vested in the plaintiff State.

[7]Browne v. Strode, 5 Cr. 303; L 3:108; (action, in the name of Justices of the Peace, nominal obligees upon an executor's bond, in purely private interest); McNutt v. Bland, 2 How. 9; L 11:159; (suit, in the name of the Governor of a State, but in a purely private interest, upon a sheriff's bond running to the Governor as obligee); Missouri, Ks. & Tex. Ry. v. Missouri R. R. Comm'rs, 183 U. S. 53; S 22:18; L 46:78; suit by the members of a board of State Railroad Commissioners, in their own names, but as such Commissioners, in a Court of the State, to enforce railroad rates fixed by them; the beneficial interest in the subject-matter being viewed as being vested in the general unorganized public, (q. v.), and not in the Sovereign.

of right of exercise of Eminent Domain) is not, in law, a suit by the Sovereign who granted the franchise.[8]

§ 619. Application of General Principles and Rules of Procedure.

With the exceptions to be considered immediately below, such general principles and rules of Procedure as are based upon, and represent, fundamental requirements of justice, are applicable to suit by a Sovereign.[9]

The exceptions referred to immediately above, are: that a Sovereign is not, by general principles, subject to Statutes of Limitation,[10] or to the doctrine of Laches.[11]

A Sovereign, as plaintiff below, has, under present Federal Judiciary legislation, no exceptional right to Federal Error, in Civil causes.[12]

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[8]Traction Co. v. Mining Co., 196 U. S. 239; S 25:251; L 49:462.

[9]As, in respect of burden of proof; necessary character and features of evidence and presumptions, (Maxwell Land-Grant Case, 121 U. S. 325; S 7:1015; L 30:949; Colorado Coal Co. v. United States, 123 U. S. 307; S 8:131; L 31:182; United States v. Iron Silver Min'g Co., 128 U. S. 673; S 9:195; L 32:571; United States v. Marshall Mining Co., 129 U. S. 579; S 9:343; L 32:734; United States v. Des Moines Co., 142 U. S. 510; S 12:308; L 35:1099; United States v. California Land Co., 148 U. S. 31; S 13:458; L 37:354; United States v. Winona R. R., 165 U. S. 463, 479; S 17:368; L 41:789; United States v. Stinson, 197 U. S. 200; S 25:426; L 49:724); and as to necessary parties defendant, California v. Southern Pac. Co., 157 U. S. 229; S 15:591; L 39:683.

[10]See Limitation of Actions (§ 643).

[11]Gaussen v. United States, 97 U. S. 584; L 24:1009; United States v. Insley, 130 U. S. 263; S 9:485; L 32:968.

[12]United States v. Thompson, 93 U. S. 586; L 23:982; (a case of Sovereign as intervenor, but pertinent to the case of Sovereign as plaintiff).

What has been said in the preceding sections is applicable in principle (see preceding Chapter) to suit by a quasi-Sovereign Federal State.

CHAPTER CIV.

PERMISSIVE QUASI-SUIT AGAINST A SOVEREIGN:—COURTS OF CLAIMS.

§ 620. The Subject Generally.

In Chapters immediately preceding, we have dealt with the question of a Sovereign (or a quasi-Sovereign) as party or privy to a suit, in the proper sense of that term. We are now to consider a form of Procedure in part, although not wholly, generically different from true suit.

It is a common practice for a Sovereign to consent, by statute, to the maintenance, within certain limits, and under certain conditions, of proceedings against him in one of his own Courts, for ascertainment of existence, and of the particulars, of an alleged liability of the Sovereign to a private claimant.

A proceeding of this class (1) is, and (2) is not, a suit, in the proper sense of the term: the distinction being as follows:—

(1) Its aspect of true suit is shown in its capability of being committed, in the Federal system, to the Judicial Branch, within the strictly Judicial capacity of that Branch: either (a) in Original,[1] or (b) in Appellate, Jurisdiction.[2]

(2) Its aspect, on the other hand, of not being a true suit, is shown: (a) by potential State limitation of Original Jurisdiction (upon a claim against a State) to Courts of the State (to the exclusion of the Federal Original Jurisdiction);[3] (b) in revocability of the Sovereign's consent to suit, at any stage of a pending such proceeding,[4] even after

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[1]Minnesota v. Hitchcock, 185 U. S. 373; S 22:650; L 46:954.

[2]Many cases of Appeal from the Federal Court of Claims.

[3]Smith v. Reeves, 178 U. S. 436; S 20:919; L 44:1140; Chandler v. Dix, 194 U. S. 590; S 24:766; L 48:1129; Murray v. Wilson Co., 213 U. S. 151; S 29:458; L 53:742.

[4]Beers v. Arkansas, 20 How. 527; L 15:991; Railroad v. Tennessee, 101 U. S. 337; L 25:960; Railroad v. Alabama, 101 U. S. 832; L 25:973; Baltzer v. North Carolina, 161 U. S. 240; S 16:500; L 40:684.

judgment, and where nothing remains to be done but the supplying of money, by the Legislative Branch, for satisfaction of the judgment;[5] and (c) in the case of a State, of exclusive State power of Interpretation of the State (Legislative) consent, in respect of the question whether, upon the facts disclosed, the complainant's case is within the terms of the consent.[6]

The field of action of such quasi-suits is commonly exclusive of claims in tort; and this limitation exists in Federal quasi-Courts of the class in question.[7]

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[5]Railroad v. Alabama, cited above.

[6]Saussure v. Gaillard, 127 U. S. 216; S 8:1053; L 32:125.

[7]Basso v. United States, 239 U. S. 602; S 36:226; L 60:462; many earlier cases.

CHAPTER CV.

Judicial Exclusiveness by Priority.

§ 621. The General Principle.

The Common Law principles dealing with Exclusiveness of a particular Court by mere Priority, as against another Court inherently capable of jurisdiction in the premises, are—subject to certain qualifications considered below—adopted and followed by the Federal law, not only as between Courts co-ordinate, inter se (as, State Courts of different States, or a State Court and a Court of a Federal State),[1] but as between an inferior intra-State Federal Court of Original Jurisdiction, and a State Court; and, in the latter case, in favor, indifferently of the Federal Court,[2] or of the State Court.[3]

§ 622. Necessary Federal Qualifications.

1. A pending State suit (or a pending Federal suit not in Bankruptcy) necessarily yields to a newly instituted

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[1]Barton v. Barbour, 104 U. S. 126; L 26:672.

As to co-ordinateness, in general, of a State Court and a Court of a Federal State, see §§ 644-650.

[2]Hagan v. Lucas, 10 Pet. 400; L 9:470; Wallace v. M'Connell, 13 Pet. 136; L 10:95; Freeman v. Howe, 24 How. 450; L 16:749; Riggs v. Johnson County, 6 Wall. 166; L 18:768; Heidritter v. Elizabeth Oil-Cloth Co., 112 U. S. 294; S 5:135; L 28:729; Rio Grande R. R. v. Gomila, 132 U. S. 478; S 10:155; L 33:400; White v. Schloerb, 178 U. S. 542; S 20:1007; L 44:1183 (a case into which the feature of Bankruptcy entered); Farmers' Loan & Trust Co. v. Lake Street R. R., 177 U. S. 51; S 20:564; L 44:667 and, (under the title of Lake Street R. R. v. Farmers' Loan & Trust Co.), 182 U. S. 417; S 21:870; L 45:1161; Julian v. Central Trust Co., 193 U. S. 93; S 24:399; L 48:629; Wabash R. R. v. Adelbert College, 208 U. S. 38; and 208 U. S. 609; S 28:182; L 52:379; S 28:425; L 52:642.

[3]Peale v. Phipps, 14 How. 368; L 14:459; Stout v. Lye, 103 U. S. 66; L 26:428; Porter v. Sabin, 149 U. S. 473; S 13:1008; L 37:815; In re Chetwood, 165 U. S. 443; S 17:385; L 41:782; Palmer v. Texas, 212 U. S. 118; S 29:230; L 53:435.

As to Collateral issues, see that head, (§§ 575, 576), and Buck v. Colbath, 3 Wall. 334; L 18:257; Taylor v. Taintor, 16 Wall. 366; L 21:287.

As to Ancillary suits, see § 584.

Bankruptcy proceeding, in so far as is essential to effectuality of the Federal Bankruptcy laws,[4] but only to that extent.[5]

2. What has been said of Federal Bankruptcy Courts is true, mutatis mutandis, of Federal Admiralty Courts. Thus, the rule of Priority in favor of a Common Law or Equity Court fails in favor of a subsequent Admiralty suit of broad and general character, as, a Limited Liability suit,[6] or a suit for enforcement in rem of a Maritime lien;[7] while, on the other hand, a State Court attachment of a vessel on mesne process may hold as against an Admiralty suit, even in rem, for wages;[8] and it would be competent to the Admiralty Court, in its discretion, to allow the State Court suit to proceed to a declaratory judgment, and then to take into Admiralty the enforcement of the Maritime lien.[9]

3. A State Probate proceeding, instituted pending a Federal suit, does not oust the Federal jurisdiction in respect

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[4]Thus, a Bankruptcy suit ousts the jurisdiction of a pending State Insolvency or winding-up suit. In re Watts & Sachs, 190 U. S. 1; S 23:718; L 47:933.

So, where a sheriff holds the proceeds of an execution sale, for payment thereof to the judgment creditor, the filing of a petition in Bankruptcy against the latter, ousts the State Court's jurisdiction over the fund, and vests title and right of possession in the trustee in Bankruptcy. Clarke v. Larremore, 188 U. S. 486; S 23:363; L 47:555.

[5]Thus, in the case of a State Court suit for reformation of a written contract, and subsequent Bankruptcy procedure instituted in respect of the defendant, the Bankruptcy suit is subject to the ultimate State Court decree upon the question of reformation. Zartman v. First Bank, 216 U. S. 134; S 30:368; L 54:418.

(In Blake v. Openhym, 216 U. S. 322; S 30:309; L 54:498; a like situation arose; but the proposition of the text was not in question, since the trustee in Bankruptcy consented to a continuation of the State Court suit).

So of the State Court's power to proceed to judgment simply in support of an attachment lien protected by a Bankruptcy Act. Peck v. Jenness, 7 How. 612; L 12:841; various later cases.

[6]Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578; S 3:379; L 27:1038.

[7]Moran v. Sturges, 154 U. S. 256; S 14:1019; L 38:981; The Resolute, 168 U. S. 437; S 18:112; L 43:533.

[8]Taylor v. Carryl, 20 How. 583; L 15:1028.

[9]See Moran v. Sturges, cited above.

of the merits; but leaves the Federal Court free to proceed to a declaratory judgment; enforcement, however, of the Federal judgment being vested in the Probate Court in its process of distribution of assets.[10]

4. When Priority fails, (and the later suit ousts, in general the earlier jurisdiction), the earlier jurisdiction may, nevertheless, continue to certain minor intents, essential to justice and to just practical results: as, for necessary immediate disposal of perishable goods.[11]

§ 623. The Date of Commencement of Suit.—Corporeal, or Incorporeal, Res.

1. In respect of the definition (as between two suits) of commencement of suit, and of obtaining jurisdiction, there is nothing peculiar to the field of Priority, but general principles are applicable: as, in the matter of actual seizure, as distinguished from the filing of a bill in Equity.[12]

2. So, of the distinction between corporeal, and incorporeal, res.[13]

§ 624. Termination of the Earlier Suit.

In a controversy over a question of exclusiveness by Priority, in a particular instance, there may naturally arise the question of termination of the earlier suit prior to the commencement of the later suit. That question, of course, turns upon general or particular principles of Procedure law operative upon the earlier suit.[14]

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[10]Rio Grande R. R. v. Gomila, 132 U. S. 478; S 10:155; L 33: 400.

[11]Jones v. Springer, 226 U. S. 148; S 33:64; L 57:161. So, for preservation of liens; see other cases, cited above in this section.

[12]Farmers' Loan & Trust Co. v. Lake Street R. R., 177 U. S. 51; S 20:564; L 44:667; Palmer v. Texas, 212 U. S. 118; S 29:230; L 53:435.

[13]Cases generally, cited above, in this section.

[14]An illustrative decision, turning upon general principles of Procedure is Shields v. Coleman, 157 U. S. 168; S 15:570; L 39:660. A Federal Court of Equity in a Receivership suit accepted a bond in lieu of the property; discharged its Receiver, and turned the property over to the owner without reservation of further jurisdiction. A State Court (general jurisdictional conditions existing) was thereupon competent to entertain a Receivership suit, and to hold jurisdiction as against a subsequently instituted new Federal Receivership suit.

§ 625. Distributive Operation of the Principle.

It may occur that in a particular instance the question of Priority is not broadly and sharply presented. In such a situation, the principle is applied distributively, according to the reason of the thing.[15]

§ 626. Earlier Pending Suit as Mere Matter of Abatement.

It will be understood that what has been said above is applicable only in the field of Priority proper, and not in that of mere Abatement. In the latter field, as in the former, the Common Law principles prevail, as between Courts co-ordinate inter se. Thus, pendency of a suit in a State Court, for the same cause of action, is not pleadable in a Court of a Federal State.[16]

So, a pending Equity suit is not necessarily exclusive as against a subsequently instituted State Criminal prosecution dealing with the same general state of facts.[17]

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[15]Shelby v. Bacon, 10 How. 56; L 13:326: (a State Insolvency proceeding held, on the facts, not exclusive of a Federal Equity suit).

As to non-Exclusiveness of a State Probate proceeding as against the Federal Original Jurisdiction, in respect of claims against an estate, and the like, see §§ 772-776.

[16]Stanton v. Embrey, 93 U. S. 548; L 23:983. (As to co-ordinateness of a State Court and a Court of a Federal State, see §§ 644-650).

[17]Harkrader v. Wadley, 172 U. S. 148; S 19:119; L 43:399.

CHAPTER CVI.

JUDGMENT:—RES JUDICATA.

§ 627. Certain General Principles.

The Federal law adopts the Common Law principles relating to judgments. We need notice only certain Federal applications of those principles.

(1) A judgment may, to one or to another intent, and for one or another reason, be merely declaratory of rights.[1]

(2) A judgment may, on its face, leave some material matter open and not passed upon; but may, nevertheless, be binding as to matters passed upon.[2]

(3) If a judgment creditor requires and seeks (for enforcement of his judgment), supplementary process in Equity, he subjects himself to the general principles which govern the reformation of judgments; and, to the extent of those principles, the merits of the judgment are open to inquiry.[3]

(4) If, even at law, a judgment creditor, seeking supplementary independent process for enforcement of his judgment, needs, by the nature of the case, to go into the question of the merits of the judgment, then, and in such case, the question of merits is open to the judgment debtor.[4]

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[1]There may, for example, after discharge of a Bankrupt, be entered a declaratory judgment, for effect against sureties (as, upon an attachment bond upon mesne process). Hill v. Harding, 130 U. S. 699; S 9:725; L 32:1083.

[2]Stovall v. Banks, 10 Wall. 583; L 19:1036; Cromwell v. County of Sac, 94 U. S. 351; L 24:195; Burgess v. Seligman, 107 U. S. 20; S 2:10; L 27:359; Dennison v. United States, 168 U. S. 241; S 18:57; L 42:453; Forsyth v. Vehmeyer, 177 U. S. 177; S 20:623; L 44: 723.

So, when the judgment, on its face, covers the whole field, but certain matters in controversy are, by an agreement in pais, left for adjustment in pais. Stillman v. Combe, 197 U. S. 436; S 25:480; L 49:822.

[3]Guardian Trust Co. v. Fisher, 200 U. S. 57; S 26:186; L 50:367.

[4]Nelson v. St. Martin's, 111 U. S. 716; S 4:648; L 28:574; Brownsville v. Loague, 129 U. S. 493; S 9:327; L 32:780; (petitions for Mandamus).

(5) Procedure supplementary to a judgment may take any form necessary to effectuality.[5]

(6) There is a strong (and, in general, a conclusive) presumption that issues raised by the pleadings were passed upon.[6]

(7) Jurisdiction, in the strict sense, is open to collateral challenge in the home forum or in another forum.[7]

Where, however, jurisdiction, in the strict sense, existed, mere errors in form of Procedure are not open to collateral attack.[8]

§ 628. Judgment by Consent.

It is competent to a person to consent to the entry of judgment against him, without actual Judicial investigation of his liability, provided the interests of third persons be not unfavorably affected.[9]

A judgment rendered by consent lacks, however, to certain secondary intents, the finality of a judgment adversely

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[5]Thus, a successful defendant, in a Patent infringement suit, may, by a new suit, in Equity, enjoin the late (defeated) plaintiff from bringing, or from maintaining, like infringement suits against actual or proposed customers of the original (prevailing) defendant. Kessler v. Eldred, 206 U. S. 285; S 27:611; L 51:1065.

For an example of an unsuccessful attempt to strain this principle to the raising of new issues, not covered by the judgment, see New York L. Ins. Co. v. Dunlevy, 241 U. S. 518; S 36:613; L 60:1140.

[6]Fayerweather v. Ritch, 195 U. S. 276; S 25: 58; L 49:193.

[7]Rose v. Himely, 4 Cr. 241; L 2:608; Thompson v. Whitman, 18 Wall. 457; L 21:897; Knowles v. Gaslight etc. Co., 19 Wall. 58; L 22:70; Cooper v. Newell, 173 U. S. 555; S 19:506; L 43:808; National Exchge. Bank v. Wiley, 195 U. S. 247; S 25:70; L 49: 184.

[8]Kempe's Lessee v. Kennedy, 5 Cr. 173; L 3:70; Griffith v. Bogert, 18 How. 158; L 15:307; Insley v. United States, 150 U. S. 512; S 14:158; L 37:1163.

[9]Dickerman v. Northern Trust Co., 176 U. S. 181; S 20:311; L 44:423. In this case, a corporation mortgage to trustees, securing bonds, provided that in case of judgment for an instalment of interest and of issue of execution against the corporation, and failure of satisfaction, the trustees might declare the principal immediately due and payable, and that the mortgage should be immediately subject to foreclosure. Concerted action (of one bondholder and the trustees, and the corporation), under which suit was brought, judgment recovered, and execution issued and returned unsatisfied, all within one day, was a sufficient basis for foreclosure, (all parties interested being represented, either directly or by the trustees).

rendered. Thus, if aid of a Court of Equity is sought, in furtherance or enforcement of a consent judgment or decree, the Court will, upon cause shown, inquire into the merits of the judgment or decree.[10]

§ 629. Judgment—Such in Form Only.

A judgment, such in form, but binding and operative only by force of acts in pais between the parties, (as, by a contract not dealt with by the judgment), is not a judgment, but is a mere feature or element of such acts in pais.[11]

§ 630. Collateral Aspect.

What has been said, in general terms, in preceding sections, applies, mutatis mutandis, to the situation in which a judgment is offered and relied upon, not as between the parties (or privies) to it, but as a mere extraneous but material fact: as, where one link in a plaintiff's chain of title is a sale under a judgment; or where, in a suit for damages, the plaintiff relies upon the fact of judgment obtained against him by a stranger as the result of wrongful action of the present defendant.[12]

§ 631. Res Judicata.

Illustration in the field of res judicata, of Federal Adoption of Common Law principles, may be presented as follows:—

(1) The principles of res judicata apply only where (or in so far as) the issues in the earlier and in the later suit are the same.[13]

(2) A judgment is operative by way of res judicata, not merely in respect of the primary issues, but in respect also

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[10]Lawrence Mfg. Co. v. Janesville Mills, 138 U. S. 552; S 11:402; L 34:1005.

[11]Bagley v. General Fire Extinguisher Co., 212 U. S. 477; S 29:341; L 53:605.

[12]Winona etc. R. R. v. Plainview, 143 U. S. 371; S 12:530; L 36:191.

[13]Memphis Bank v. Tennessee, 161 U. S. 186; S 16:468; L 40:664; Southern Pac. R. R. v. United States, 168 U. S. 1; S 18:18; L 42:355; Brady v. Daly, 175 U. S. 148; S 20:62; L 44:109; Troxell v. Delaware, L. & W. R. R., 227 U. S. 434; S 33:274; L 57:586; Radford v. Myers, 231 U. S. 725; S 34:249; L 58:454.

of incidental issues actually and properly raised and passed upon as bases of the judgment.[14]

(3) A judgment is final, for the purposes now in question, not only upon issues actually raised, but upon issues which might have been, (but were not), raised, by one or by the other party, as the case may be.[15]

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[14]Barber v. Barber, 21 How. 582; L 16:226: (where it was essential to operativeness as of the whole period as to which it was given effect, that the husband's Wisconsin divorce was not operative in Wisconsin; the New York decree being plainly terminable as of the future by divorce).

Caujolle v. Ferrie, 13 Wall. 465; L 20:507; (where status as legitimate son of the deceased was essential, in a certain instance, to right of administration on a petitioner's part, a decree, rendered upon contest, appointing him administrator, was final in other suits, as between him and other heirs or claimants, on that point).

Bissell v. Spring Valley, 124 U. S. 225; S 8:495; L 31:411 (where the question of validity of bonds and of coupons is one and the same, a judgment upon and in favor of bonds, presents res judicata in favor of coupons).

New Orleans v. Citizens' Bank, 167 U. S. 371; S 17:905; L 42:202; Citizens' Bank v. Parker, 192 U. S. 73; S 24:181; L 48:346; Gunter v. Atlantic Coast Line, 200 U. S. 273; S 26:252; L 50:477: a judgment of validity or of invalidity of taxation in one certain year, binding (where the same questions are involved), in respect of other years.

Harding v. Harding, 198 U. S. 317; S 25:679; L 49:1066; (a finding, in favor of a wife, of good grounds for her living apart from her husband, over a certain fixed period; and a decree of separate maintenance, involving and based upon such finding, final and binding, as a bar to a subsequent suit by the husband for divorce, based upon such living apart, by the wife, as desertion on her part).

Everett v. Everett, 215 U. S. 203; S 30:70; L 54:158; a finding and judicial declaration of non-marriage (in a suit for statutory separate maintenance), incorporated into, and made the record basis of, a decree for the respondent, is thus binding. See also, Fayerweather v. Ritch, 195 U. S. 276; S 25:58; L 49:193.

Bryar v. Campbell, 177 U. S. 649; S 20:794; L 44:926.

[15]Dowell v. Applegate, 152 U. S. 327; S 14:611; L 38:463; (failure of the plaintiff to set up one certain ground of claim: judgment adverse to him, final).

Werlein v. New Orleans, 177 U. S. 390; S 20:682; L 44:781. Failure of a municipal corporation, (in defence to levy of execution upon land held in legal title by the corporation) to set up mere trust character of such title, and Equitable title in the State or in the public, inconsistent with such levy. By reason of such failure, the levy held binding as against a subsequent suit by the corporation.

United States v. California etc. Land Co., 192 U. S. 355; S 24:266;

The question of what (for the purposes of our present discussion) should have been pleaded, or otherwise presented for consideration, is, primarily, governed by Procedure law of (or operative in) the forum of the suit in which the judgment was rendered.[16]

This principle is obviously subject to a qualification (based upon general principles) to the effect: that where the failure of one party to put in issue a certain ground which he should, on general grounds, have put in issue, is due to conduct (of the other party) either strictly inequitable, or violative of the practical considerations underlying the rule now in question; then, and in such case, (and from the point of view of estoppel, as against such other party), the judgment is not, as against the first party, operative upon such issue thus not raised.[17]

L 48:476: a judgment adverse to the United States, in a suit to vacate a land patent (as voidable on general grounds), held a bar to a subsequent suit by the United States to recover the land as being Indian reservation and exempt from patent,—this ground having been capable of being joined with the more general ground presented in the first suit: (three Justices dissenting, on the ground that the principle now in question was not applicable to this case).

So, Northern Pac. Ry. v. Slaght, 205 U. S. 122; S 27:442; L 51: 738; Fauntleroy v. Lum, 210 U. S. 230; S 28:641; L 52:1039.

[16]Thus, in one jurisdiction, a defendant (a) may be required, and in another jurisdiction (b) may not be permitted; or (c) may be merely permitted, at his option, to plead counter-claims, of one or of another class; and in either of the latter situations, a judgment is not res judicata upon such matters not pleaded, and not in issue. Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252; S 30:78; L 54:178.

[17]Nesbit v. Riverside District, 144 U. S. 610; S 12:746; L 36: 562. In this case, a certain issue of bonds, by a certain municipal corporation, went, in aggregate amount, beyond the debt limit. One person bought, from an original purchaser, the whole issue, and thereby had notice of the excess above the debt limit, and of invalidity thereby of the whole issue. He had occasion thereafter to sue the corporation upon the bonds; but instead of suing upon them all at once, and thereby disclosing (or at least suggesting) upon the record, his such constructive notice, he sued at first, upon only a limited number of them, (in their aggregate amount within the debt limit), and thereby suppressed from the record the fact of his such constructive notice of invalidity. The corporation, not knowing the facts above stated (relating to his purchase and ownership) did not raise the defence of his such notice; and the plaintiff recovered judgment. In a subsequent suit by him, upon the remaining bonds, (the actual

(4) For the purposes of res judicata, the grounds of a judgment, and the issues actually passed upon, may be shown by extrinsic evidence.[18]

(5) A judgment, to be operative by way of res judicata, must be germane to the pleadings.[19]

(6) It is, of course, competent to any political jurisdiction, to limit, by law, the operation, by way of res judicata, in the home forum, of domestic judgments. A domestic limitation, thus imposed, enters into, and correspondingly qualifies, the judgment, pro tanto, in and for other forums.[20]

(7) The mere fact that a judgment is rendered by consent, does not take it out of the operation of the doctrine of res judicata.[21]

(8) A judgment based upon res judicata has the same finality as a judgment rendered upon an original ground.[22]

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question of validity being the same as to the whole issue), he relied upon this judgment as, under the principle considered in par. 4 of this section, conclusive in his favor, to the point of validity of the bonds now sued upon. His contention was, however, not sustained, and the corporation was held to be not estopped by it from setting up, in the second suit, such constructive notice of invalidity. The decision may be rested upon the principle that estoppel is a good answer to estoppel.

[18]Miles v. Caldwell, 2 Wall. 35; L 17:755; Wilson's Ex'or v. Deen, 121 U. S. 525; S 7:1004; L 30:980; Texas & Pac. Ry. v. Southern Pac. Co., 137 U. S. 48; S 11:10; L 34:614; Forsyth v. Vehmeyer, 177 U. S. 177; S 20:623; L 44:723; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252; S 30:78; L 54:178.

[19]Reynolds v. Stockton, 140 U. S. 254; S 11:773; L 35:464; (unless, of course, in a given instance, both parties wander outside the pleadings to such extent and in such manner that issues not pleaded are actually tried, by consent, and an estoppel arises).

[20]As, where, by the law of a certain State, a domestic judgment, dealing with validity of taxes of a certain year, is not, in the Courts of the State, res judicata for other years. Union Bank v. Memphis, 189 U. S. 71; S 23:604; L 47:712; Covington v. First Bank, 198 U. S. 100; S 25:562; L 49:963.

See Thompson v. Thompson, 226 U. S. 551; S 33:129; L 57:347 (alimony).

[21]Burgess v. Seligman, 107 U. S. 20; S 2:10; L 27:359.

[22]Deposit Bank v. Frankfort, 191 U. S. 499; S 24:154; L 48:276: (a Federal judgment, based upon res judicata, as defined, in the case, by State Judicial Precedent, not qualifiable by a subsequent change in State Judicial decision. The decision apparently rests upon general principles, and not upon any peculiar potency of a Federal, as against a State judgment).

(9) There is nothing in the nature of a Criminal cause (or of a Penal cause as distinguished from an ordinary Civil cause), to remove such cause from the operation of the principles of res judicata, where they are otherwise operative.[23]

(10) The details of Procedure law of the forum of the judgment in question, are, in general, not material from the standpoint of res judicata.[24]

(11) The doctrine of Judicial Precedent has no interrelation with the doctrine of res judicata. That is to say, a given Judicial Precedent is operative broadly, without distinction between persons who were, and, persons who were not, parties to the suit.[25]

§ 632. Reformation of a Contract, after Adverse Judgment.

Judgment at law, adverse to a claim based upon a written contract, is adversely operative only upon the contract as written, and is no bar to reformation of the contract and enforcement of it (as reformed) in favor of the original plaintiff-at-law.[26]

§ 633. Mere Interpretation of a Judgment.

A judgment is open to interpretation by any Court in which, for any purpose, it is presented.[27]

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[23]§§ 601, 607.

[24]Thus, a Federal Circuit Court judgment for an amount too small to permit of Error, was held binding, by way of res judicata, in a subsequent action (in the same Circuit Court) of Appellate amount, (and binding to the exclusion of Error, in the second cause, upon questions of law passed upon in the earlier judgment. Johnson Co. v. Wharton, 152 U. S. 252; S 14:608; L 38:429).

[25]Thus, the Supreme Court, in suits between private persons, affirmed the validity of certain Territorial bonds—the controversy being one of law. (Utter v. Franklin, 172 U. S. 416; S 19:183; L 43:498; Murphy v. Utter, 186 U. S. 95; S 22:776; L 46:1074). Subsequently in a suit by the Territory against the county, based upon the theory of validity of the bonds, (which had, in the mean time, been marketed), it was held that the precedent should be followed, without further consideration of the question. Vail v. Arizona, 207 U. S. 201; S 28:107; L 52:169.

[26]Northern Assurance Co. v. Grand View Ass'n, 203 U. S. 106; S 27:27; L 51:109.

[27]Subject, of course, in the case of a Federal judgment, as such, and of Federal Question generally, to Federal Appellate Review.

The principle is illustrated:—

(a) In State power of collateral interpretation, not merely of a Federal judgment resting upon Federal jurisdiction by diversity of citizenship, whether at Common Law,[28] or in Equity;[29] but of a judgment rendered in a Jurisdiction Federally Exclusive (as, in the case of a Bankruptcy discharge, in respect of its operation upon a particular debt, in suit in the State Court);[30] or of a Bankruptcy order of sale;[31]

(b) In corresponding Federal power, in respect, not only of a State Common Law judgment,[32] or a State Equity decree,[33] but likewise of a judgment of a State Court of Exclusive direct Jurisdiction: as, a Probate Court,[34] or a Divorce Court.[35]

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[28]As in Werlein v. New Orleans, 177 U. S. 390; S 20:682; L 44:817.

[29]Texas & Pac. Ry. v. Southern Pac. Co., 137 U. S. 48; S 11:10; L 34:614; Citizens' Bank v. Parker, 192 U. S. 73; S 24:181; L 48:346.

[30]Neal v. Clark, 95 U. S. 704; L 24:586; Hennequin v. Clews, 111 U. S. 676; S 4:576; L 28:565; Strang v. Bradner, 114 U. S. 555; S 5:1038; L 29:248; Forsyth v. Vehmeyer, 177 U. S. 177; S 20:623; L 44:723.

[31]New Orleans etc. R. R. v. Delamore, 114 U. S. 501; S 5:1009; L 29:244.

[32]As in Werlein v. New Orleans, cited above.

[33]As in Dupasseur v. Rochereau, 21 Wall. 130; L 22:588; New Orleans v. Citizens' Bank, 167 U. S. 371; S 17:905; L 42:202.

[34]Caujolle v. Ferrie, 13 Wall. 465; L 20:507.

[35]Harding v. Harding, 193 U. S. 317; S 25:679; L 49:1066; Everett v. Everett, 215 U. S. 203; S 30:70; L 54:158.

CHAPTER CVII.

General Principles of Statutory Remedy As, or As Not, Exclusive, From the Federal Standpoint.

§ 634. Scope of the Chapter:—Prefatory Considerations.

1. It is proposed in the present Chapter to deal with the question of statutory remedy as Exclusive, or as not Exclusive, from the standpoint only of the Common Law as Federally adopted and followed, and apart from such considerations as are based, not upon Common Law principles of Procedure, but upon considerations peculiar to our political system: such considerations, and their legal results in Procedure, being matters primarily of Substantive (Federal) law, and only secondarily matter of Procedure.[1]

2. At the Common Law, the question of Exclusiveness or non-Exclusiveness, of a particular statutory Judicial remedy, as against other forms (inherently not inappropriate) of remedy, is a mere question of statutory Interpretation: that is to say, a question of interpretation, to this intent, of a particular statute creating such a remedy, —it being competent, in general, to the Legislative authority, in creating such remedy, to make it Exclusive or not, at pleasure.

The only Common Law principles, therefore, in this field, are certain principles of statutory Interpretation, the chief of which are considered respectively in the two succeeding sections.

The Federal adoption of this Common Law principle of Interpretation is, as matter of strict Federal law (as distinguished from mere Federal Adoption of State Judicial Procedure) limited, by the nature of the subject: (a) to Federal statutory remedy, (since the States, severally are of full liberty of action, in respect of State statutory remedy); and (b) (in the Federal field) to Congressional

[1] As to such latter matters, see Federal Judicial Exclusiveness; State Judicial Exclusiveness, and particular heads, as Admiralty, Probate, Divorce.

statute remedy of general character, as distinguished from statute remedy created by (or under) Congress for some certain Federal State or a class of Federal States, or Federal States as a class.

The fact of Federal adoption, in general, of the Common Law principles of Interpretation, and the degree of force of the Interpretative presumption (in the strictly Federal, and in the general Congressional, fields immediately above distinguished)—when the Common Law principles are not inappropriate to the Federal system,—are illustrated in a number of different classes of situations.

§ 635. Illustration.

The chief of the principles of Interpretation above referred to, is to the effect: that presumptively, (in the absence of specific expression of Legislative intent,) statutory remedy is intended to be, and is, Exclusive. This Common Law principle of Interpretation is adopted by the Federal Law, in so far as it is pertinent to the Federal Political and Judicial system: that is to say, in so far as it is not controlled by the peculiar requirements and features generally of the latter system.

The existence, and the degree of force, of the presumption, are illustrated in different classes of situations dealt with for convenience, separately, in the margin:

(1) Congressional Remedy, in Federal Courts of Original Jurisdiction.[2]

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[2]Barnet v. National Bank, 98 U. S. 555; L 25:212. (An Act of Congress fixed a rate of interest, and provided that the taking of a greater interest should work a forfeiture of the whole interest, and that the person paying might within two years in an action of debt recover twice the amount of (excess of) interest paid. It is held that the statute remedy is Exclusive, and that the usury cannot be set up and relied on in defence, in a suit by a bank for principal and interest. In this decision the principle of Exclusiveness of a statutory remedy is held to override the general principle that illegality may be set up in defence. It might well have been held that the defence of usury might be set up as a defence to excess of interest and not by way of counterclaim for the double damage.

Arnson v. Murphy, 109 U. S. 238; S 3:184; L 27:920; (exclusiveness of Congressional statutory remedy against a tax collector, for taxes alleged to have been illegally assessed and collected).

United States v. Sing Tuck, 194 U. S. 161; S 24:621; L 48:917;

(2) Exclusiveness, in a Court of the United States, of a statute remedy created by a Foreign nation.[3]

(3) Exclusiveness of Congressional remedy, as against the State Courts.[4]

(4) State statutory remedy, as Exclusive in a Federal Court,[5] but with potential necessary adaptation to Federal Procedure.[6]

§ 636. Limitation of the Presumption.

The presumption above considered is limited to the particular class of causes of action specifically in contemplation in a statute remedy, and does not extend to distinctly different classes of causes of action arising upon the same facts.[7]

(exclusiveness of statutory remedy of Appeal to an Executive officer, in Immigrant cases,—as against habeas corpus).

Globe Newspaper Co. v. Walker, 210 U. S. 356; S 28:726; L 52: 1096; (exclusiveness of the Congressional statutory Copyright remedy).

[3]Slater v. Mexican Nat. R. R., 194 U. S. 120; S 24:581; L 48: 900; (statute remedy, provided by a Foreign nation, of an action for death, by negligence, with damages in the nature of alimony during widowhood, and pension for children).

[4]Haseltine v. Central Bank (No. 2), 183 U. S. 132; S 22:50; L 46:118; Schuyler Bank v. Gadsden, 191 U. S. 451; S 24:129; L 48: 258; (cases substantially on the footing of Barnet v. National Bank, cited above, except in being brought in a State Court); Minnesota v. Northern Securities Co., 194 U. S. 48; S 24:598; L 48:870; (Sherman Act); Pecos & Northern Tex. Ry. v. Rosenbloom, 240 U. S. 439; S 36:390; L 60:730; Seaboard Air Line v. Kenney, 240 U. S. 489; S 36:458; L 60:762.

[5]Pollard v. Bailey, 20 Wall. 520; L 22:376; Fourth Bank v. Francklyn, 120 U. S. 747; S 7:757; L 30:825; Middletown Bank v. Railway, 197 U. S. 394; S 25:462; L 29:803; (Exclusiveness, as against a Common Law action in a Court of the United States, of a State statutory remedy against shareholders); Northern Pac. R. R. v. Babcock, 154 U. S. 190; S 14:978; L 38:958; (statutory action for death).

See East Tennessee etc. R. R. v. Southern Telegr. Co., 112 U. S. 306; S 5:168; L 28:746.

[6]Stewart v. Baltimore & O. R. R., 168 U. S. 445; S 18:105; L 42: 537.

[7]Thus, the Congressional statutory remedy against directors of national banks, is not Exclusive of a Common Law action in a State Court (or, a fortiori in a Federal Court), against one who was such a director, for inducing, by deceit, the purchase by the plaintiff, of shares in the bank. Thomas v. Taylor, 224 U. S. 73; S 32:403; L 56:673; Jones Bank v. Yates, 240 U. S. 541; S 36:429; L 60:788.

§ 637. Statutes of Limitation.

While statutory Limitation of action is, in general, governed by the law of the forum,[8] nevertheless, a statutory remedy may prescribe a specific period of Limitation as a qualificatory feature of the remedy; and, in such case, the Limitation follows the remedy into all forums, at least when the prescribed period is not longer than the period prescribed by the pertinent general law of the forum.[9]

§ 638. Taxation as Statutory Remedy.

If a peculiar form, mode, and extent of taxation (by the home forum) is provided as an exclusive remedy in futuro, for a certain class of suit, this remedy may enter into the cause of action and be exclusive.[10]

§ 639. Damages.

What has been said of other features, in general, of statutory remedy, is true, in general, of the rule of damages.[11]

§ 640. Statutory Remedy Legislation Dealing Incidentally with Substantive Law.

Although we are, in the present Chapter, dealing only with statutory remedy as such, we may, at the present point, call attention to the fact that a statute creative primarily of remedy, may incidentally affect Substantive law.[12]

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[8]See Statutes of Limitation (§ 643).

[9]The Harrisburg, 119 U. S. 199; S 7:140; L 30:358; Arnson v. Murphy, 109 U. S. 238; S 3:184; L 27:920; Davis v. Mills, 194 U. S. 451; S 24:692; L 48:1067; Atlantic Coast Line v. Burnette, 239 U. S. 199; S 36:75; L 60:226.

[10]Yost v. Dallas County, 236 U. S. 50; S 35:235; L 59:460; (State provision to such effect, binding upon the Federal Original Jurisdiction).

[11]Fidelity & Deposit Co. v. Bucki Co., 189 U. S. 135; S 23:582; L 47:744; Chesapeake & O. Ry. v. Kelly, 241 U. S. 485; S 36:630; L 60:1117 (uniform Federal rule of damages, for Federal and for State Courts, under Federal Employers' Liability Act).

[12]Thus, the Congressional remedy against national bank directors, while not Exclusive of Common Law action for deceit against directors as individuals (Thomas v. Taylor, 224 U. S. 73; S 32:403; L 56:673); nevertheless fixes, for such Common Law actions, certain standards of care or of negligence, as matter of Substantive law. (Case cited).

§ 641. No Limitation to the Home Forum of Common Law Action Transitory at Common Law.

In respect of a class of causes of action known to the Common Law, and, at the Common Law, of Transitory character, it is not competent to a State or to a Federal State to provide for exclusiveness of its Courts, where a particular cause of action, within such class, arises within such State or Federal State.[13]

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[13]Atchison, T. & S. F. Ry. v. Sowers, 213 U. S. 55; S 29: 397; L 53: 695; (see dissenting Opinion). The case deals specifically with a statute of a Federal State, but is broadly applicable in principle.

CHAPTER CVIII.

STATUTES OF FRAUDS.—STATUTES OF LIMITATIONS.

§ 642. Statutes of Frauds.

In respect of the generic character of a Statute of Frauds, and in respect of the principles of the subject, there is nothing peculiar to the Federal Law.[1]

In accordance with such general principles, the Federal law treats a Statute of Frauds, of the place of the making of a contract, as entering into the contract, and as following it into other forums.[2]

As in other like fields, (and to the same extent), the Federal Courts accept the home construction of a particular Statute of Frauds.[3]

The general principles are applied, mutatis mutandis, to Congressional special Statutes of Frauds, dealing with contracts to which the United States is a party,[4]—there being, however, in the case of such contracts, no question of local place of making of the contract.[5]

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[1]Salmon Falls Mfg. Co. v. Goddard, 14 How. 446; L 14:493; Lloyd v. Fulton, 91 U. S. 479; L 23:363; Butler v. Thomson, 92 U. S. 412; L 23:684; Walker v. Johnson, 96 U. S. 424; L 24:834; Howland v. Blake, 97 U. S. 624; L 24:1027; Allen v. Withrow, 110 U. S. 119; S 3:517; L 28:90; Hinchman v. Lincoln, 124 U. S. 38; S 8:369; L 31:337; other cases cited below.

[2]Grafton v. Cummings, 99 U. S. 100; L 25:366.

[3]Leffingwell v. Warren, 2 Bl. 599; L 17:261; Allen v. Massey, 17 Wall. 351; L 21:543; Moses v. Lawrence County Bank, 149 U. S. 298; S 13:900; L 37:743; Riggles v. Erney, 154 U. S. 244; S 14:1083; L 38:976; Warner v. Texas & Pac. Ry., 164 U. S. 418, 432; S 17:147; L 41:495.

[4]South Boston Iron Co. v. United States, 118 U. S. 37; S 6:728; L 30:69; St. Louis Hay etc. Co. v. United States, 191 U. S. 159; S 24:47; L 48:130; United States v. Andrews, 207 U. S. 229; S 28:100; L 52:185; United States v. New York & Porto Rico S. S. Co., 239 U. S. 88; S 36:41; L 60:161; (waiver by the United States); Ackerlind v. United States, 240 U. S. 531; S 36:438; L 60:783 (reformation, by the Court of Claims, of a written contract required to be in writing).

[5]§ 408, par. 2.

§ 643. Statutes of Limitation.

In respect of Statutes of Limitation, the Federal law follows, in general, the Common Law principles of the subject; as, to the effect:

(1) that a Statute of Limitations (a) is, in general,[6] matter not of Substance, but of mere Procedure law of the forum of suit, and does not follow a cause of action into a foreign forum;[7] but (b) may, in a particular instance, be a feature of a statutory remedy;[8]

(2) that a Statute is presumptively only of prospective operation;[9]

(3) that, in general, (but not in case of introduction of a substantially new cause of action), Amendment presumptively dates back—for the purposes of such a Statute—to the commencement of suit;[10]

(4) that War or Belligerency suspends, in general, the running of such a Statute;[11]

(5) that Statutes of Limitation look to Substance, not mere form;[12]

(6) that Equity follows, in general, a Statute of Limitations specifically operative only at law;[13] but

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[6]As to exceptional situations, see Statute Remedy as Exclusive (§ 637); and present section, ad fin.

[7]M'Elmoyle v. Cohen, 13 Pet. 312; L 10:177; Townsend v. Jemison, 9 How. 407; L 13:194; Bank of Alabama v. Dalton, 9 How. 522; L 13:242; Flowers v. Foreman, 23 How. 132; L 16:405; Christmas v. Russell, 5 Wall. 290; L 18:475; Union Pac. Ry. v. Wyler, 158 U. S. 285; S 15:877; L 39:983.

[8]§ 637.

[9]Sohn v. Waterson, 17 Wall. 596; L 21:737; (in which Federal interpretation to this effect made a State Statute Federally constitutional).

[10]Davis v. Mills, 194 U. S. 451; S 24:692; L 48:1067.

[11]Hanger v. Abbott, 6 Wall. 532; L 18:939; Levy v. Stewart, 11 Wall. 244; L 20:86; United States v. Wiley, 11 Wall. 508; L 20:211; The Protector, 12 Wall. 700; L 20:463; Adger v. Alston, 15 Wall. 555; L 21:234.

[12]Thus, a Congressional Statute of Limitations, dealing with suit by the United States to vacate a land patent, is operative upon a suit which in form is not a suit to vacate a patent, but is a suit to remove a cloud from title, alleging existence of the patent, as the cloud. United States v. Chandler-Dunbar Co., 209 U. S. 447; S 28:579; L 52:881.

[13]Patterson v. Hewitt, 195 U. S. 309, 317-319; S 25:35; L 49:214.

(7) that this practice does not prevail in Admiralty;[14]

(8) that a Statute of Limitations does not operate against a Sovereign, unless by the latter's consent;[15]

(9) that there is no Federal Constitutional principle and no principle of Federal Public Policy forbidding parties to a contract to stipulate, in respect of suit thereon, for a shorter period of Limitation than that provided by law.[16]

The Federal decisions seem to indicate, at least, if not to establish, the proposition that in respect of actions involving determination of title, an expired period of Limitation is, pro tanto, matter of title, and of right, and cannot be opened.[17]

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[14]The Key City, 14 Wall. 643; L 20:896; Workman v. New York City, 179 U. S. 552; S 21:212; L 45:314.

[15]United States v. Nashville etc. Ry., 118 U. S. 120; S 6:1006; L 30:81; (if running when a Sovereign acquires title to negotiable paper before maturity, it then ceases to run).

[16]Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386; L 19:257.

As to Federal acceptation of a local State interpretation of a State Statute of Limitations, see Dibble v. Bellingham Bay Co., 163 U. S. 63; S 16:939; L 41:72.

[17]United States v. Buford, 3 Pet. 12; L 7:585. In this case, a chose in action, in Contract, in favor of a private person, was assigned to the United States, after a State Statute of Limitations had effectually run as between the original parties. The running of the Statute was held (in the Federal Original Jurisdiction) a bar to a suit by the United States. The State Statute of Limitations was, of course, as a Statute of Limitations, of no operation as against the United States; and the decision necessarily rested upon the proposition that the running-out of the Statute prior to the purchase by the United States, had vested title in the defendant.

United States v. Chandler-Dunbar Co., 209 U. S. 447; S 28:579; L 52:881. In that case, a certain Statute of Limitations, enacted by Congress, fixed a period of Limitation for suits by the United States to vacate land patents. After the statute period had—in respect of certain land patents—expired, the United States undertook to challenge those patents, indirectly, by a suit to remove a cloud from the Government's title to the land in question—the cloud being alleged to consist in existence and colorable validity, but actual invalidity, of the land patents. The Court were of the opinion that the Statute of Limitations did not apply as a Statute of Limitations; but that the running of the statutory period had operated to vest title in the patentees, in the land in question, and that it operated thereby as a bar, not to the suit in question, but to the merits of the suit. The fact that the Statute of Limitations in question in this case had been enacted ex gratia, by the United States, was immaterial: it simply

What has been said above as to an expired period of Limitation of action, dealing with title, seems, upon principle, to be applicable, mutatis mutandis, to an expired period (recognized by local law) of adverse possession of land, in so far as, in a given jurisdiction, there is a distinction between adverse possession as such, and the operation of a Statute of Limitations.[18]

The doctrine is applicable to chattels, as to land.[19]

The essential Property (title) character of adverse possession is illustrated in the proposition that title thereby obtained to a chattel, in one jurisdiction, follows the chattel into another jurisdiction.[20]

The Federal law adopts, in general, the home forum's view of incidental operation of a Statute of Limitations: as, to the effect that a statute which has run as against a personal action for a mortgage debt, operates to bar foreclosure.[21]

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gave to the Statute of Limitations the double character (a) of law created by the United States as a Sovereign, and (b) of grant by the United States as a land-owner.

The same conclusion seems to be suggested by various cases interpreting and applying local Statutes of Limitation:—

Leffingwell v. Warren, 2 Bl. 599; L 17:261; Bacon v. Howard, 20 How. 22; L 15:811; Croxall v. Shererd, 5 Wall. 268; L 18:572; Probst v. Presbyterian Church, 129 U. S. 182; S 9:263; L 32:642; Sharon v. Tucker, 144 U. S. 533; S 12:720; L 36:532; Maxwell Land Grant Co. v. Dawson, 151 U. S. 586; S 14:458; L 38:279; Toltec Ranch Co. v. Cook, 191 U. S. 532; S 24:166; L 48:291; Dupree v. Mansur, 214 U. S. 161; S 29:548; L 53:950; Montoya v. Gonzales, 232 U. S. 375; S 34:413; L 58:645; (representing, respectively, from various standpoints, a Federal favorable view of local law making an expired Statute of Limitations a feature of title).

[18]Shelby v. Guy, 11 Wh. 361; L 6:495; Sharon v. Tucker; Toltec Ranch Co. v. Cook, both cited above; Northern Pac. Ry. v. Ely, 197 U. S. 1; S 25:302; L 49:639; Missouri Valley Land Co. v. Weise, 208 U. S. 234; S 28:294; L 52:466.

[19]Shelby v. Guy, cited above.

[20]Shelby v. Guy, cited above.

[21]Dupree v. Mansur, cited above.

CHAPTER CIX.

FAITH AND CREDIT TO JUDGMENTS AND RECORDS:—(a) AS AMONG DOMESTIC FORUMS ACTUALLY OR CONVENTIONALLY CO-ORDINATE.[1]

§ 644. The Constitutional and the Congressional Texts:—General View.[2]

Unquestionably, (1) the States would, apart from the Constitutional text cited, have recognized, inter se, the principles of Comity and of favorable presumption, in respect of foreign judgments. So, (2) unquestionably,—apart from the Congressional text cited—of the Federal States, inter se; and (3) of a State and a Federal State, inter se; and (4) as between the State Courts, and the

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[1]I. e., the States; the Federal States, and the Federal Judicial Districts in Original Common Law Jurisdiction by Diversity of Citizenship. See below.

As to co-ordinateness, actual or conventional, in Substantive law, as among States and Federal States, collectively, see Book III, §§ 213 et seq.

See also Judgment and Res Judicata (§§ 627-633).

[2]Const., Art. IV, § 1:—

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

U. S. Rev. Stats., § 905:—

> The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.

Federal Original Common Law Jurisdiction resting upon diversity of citizenship.

In these various fields, the Constitutional text and the Congressional text, collectively, assume such probable or actual situation, and operate simply:—(a) to convert Comity into strict law; and (b) to convert the favorable (but rebuttable) presumption of the Law of Nations, into a conclusive presumption.

§ 645. Adoption, in General, of the Law of Nations:—A Conventional Community of Nations.

In this field, the Constitutional text and the Congressional text respectively recognize, assume, and adopt the principles of the subject existing in the general Law of Nations: the States, the Federal States, and the United States in its Common Law Original Jurisdiction by diversity of citizenship, being viewed, to this intent, as a Community of Nations.[3]

§ 646. Illustration of Federal Recognition, Assumption, and Adoption, in this Field, of the Law of Nations.

The Federal Recognition, Assumption, and Adoption (above considered) in and by the texts cited above, of principles of the Law of Nations, is illustrated in the principles (of Federal law) now to be stated.

(1) A judgment of one forum does not operate, proprio vigore, in another forum, but is subject to Judicial recognition and establishment in the second forum: as, by direct suit upon it there; or by favorable judgment upon it, when and as set up in defence or otherwise, collaterally.[4]

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[3]Illustration of State power, in this respect, is presented in Cage's Ex'ors v. Cassidy, 23 How. 109; L 16:430; (power, in a State Court of Equity, of inquiry into the merits of a judgment of such a Federal Common Law judgment, and of Injunction, inter partes, against it).

Cases illustrative of co-ordinateness, to this intent, between a State and a Federal State are: Mills v. Duryee, 7 Cr. 481; L 3:411; Hampton v. M'Connell, 3 Wh. 234; L 4:378; Embry v. Palmer, 107 U. S. 3; S 2:25; L 27:346; Thompson v. Thompson, 226 U. S. 551; S 33:129; L 57:347; Atchison, T. & S. F. Ry. v. Sowers, 213 U. S. 55: S 29:397; L 53:695.

As to the States and the Federal States, as, to many intents of Substantive law, a conventional Community of Nations, see §§ 213 et seq.

[4]As, in Winona etc. R. R. v. Plainview, 143 U. S. 371; S 12:530; L 36:191.

(2) As among the States and the Federal States, collectively, an issue as to the law of the home forum, is an issue of fact, in a foreign forum.[5]

(3) As among all the co-ordinate or conventionally co-ordinate forums in question, jurisdiction of the home forum of a judgment, is open to challenge and inquiry in the second forum. That is to say, mere color of validity, in the home area, of a judgment, does not entitle it to recognition elsewhere; it must have been actually valid in its home area: that is to say, must have been both (a) within the scope of the Sovereignty (or quasi-Sovereignty) of the home area over the persons or things in question, and (b) within the jurisdiction of the Court rendering it.[6]

(4) In so far as (in exceptional situations) a State or a Federal State may, in general, discriminate in favor of its own inhabitants,[7] discrimination may extend adversely to a judgment of another State or of a Federal State.[8]

(5) The texts in question intend only such judgments as are (a) of Civil, and (b) of non-Penal character.[9]

(6) A judgment of one forum is subject, in general, in another forum, to mere Procedure law of the latter forum: as, to Statutes of Limitation of the latter forum.[10]

(7) Mere error in law, of a Court of the second area, is not denial of Faith and Credit, even where the error is in respect of validity or character of the judgment, or of interpretation or ascertainment of law of the home area of the judgment.[11]

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[5]See, Law as Fact, (§ 653).

[6]D'Arcy v. Ketchum, 11 How. 165; L 13:648; Public Works v. Columbia College, 17 Wall. 521; L 21:687; Overby v. Gordon, 177 U. S. 214; S 20:603; L 44:741; Wetmore v. Karrick, 205 U. S. 141; S 27:434; L 51:745; Tilt v. Kelsey, 207 U. S. 43; S 28:1; L 52:95; Brown v. Fletcher's Estate, 210 U. S. 82; S 28:702; L 52:966; Burbank v. Ernst, 232 U. S. 162; S 34:299; L 58:551.

[7]See Privileges and Immunities, (§§ 293, 294).

[8]M'Elmoyle v. Cohen, 13 Pet. 312; L 10:177; Cole v. Cunningham, 133 U. S. 107; S 10:269; L 33:538.

[9]Wisconsin v. Pelican Ins. Co., 127 U. S. 265; S 8:1370; L 32:239: (a case of a State judgment offered in the Supreme Court, but here pertinent in principle).

[10]M'Elmoyle v. Cohen, cited above; Bank of Alabama v. Dalton, 9 How. 522; L 13:242. See Statutes of Limitation.

[11]Glenn v. Garth, 147 U. S. 360; S 13:350; L 37:203; Lloyd v. Matthews, 155 U. S. 222; S 15:70; L 39:128; Banholzer v. New

§ 647. The Question of the Duty of Provision of Tribunals.

We may possibly assume a duty, on the part of each area, to provide tribunals for the enforcement of Faith and Credit, in so far as there is peculiar occasion for enforcement within such area. Where, however, there is no such peculiar occasion, no such duty appears to exist. Thus, a State is not under obligation to open its Courts, in the absence of such peculiar occasion, to suit between two corporations, both of a certain other State.[12]

§ 648. Recognition, Assumption, and Adoption of General Common Law Principles, as Distinguished from Principles of the Law of Nations.

The texts in question, respectively and collectively, recognize, assume, and adopt (together with principles of the Law of Nations) pertinent Common Law principles: as, principles relating to Judgment generally, and to Res Judicata, and to Jurisdiction, Parties, and the like.[13]

§ 649. No Limitation upon Comity.

The Faith and Credit texts impose no limitation upon Comity; but one forum may at pleasure give to a judgment of another forum recognition and effect broader than such as those texts require.[14]

York L. Ins. Co., 178 U. S. 402; S 20:972; L 44:1124; Johnson v. New York L. Ins. Co., 187 U. S. 491; S 23:194; L 47:273; Finney v. Guy, 189 U. S. 335; S 23:558; L 47:839; National Mut. Bldg. & Loan Ass'n v. Brahan, 193 U. S. 635; S 24:532; L 48:823; Allen v. Allegheny Co., 196 U. S. 458; S 25:311; L 49:551; Harris v. Balk, 198 U. S. 215; S 25:625; L 49:1023; Smithsonian Inst'n v. St. John, 214 U. S. 19; S 29:601; L 53:892; El Paso and Southw. R. R. v. Eichel, 226 U. S. 590; S 33:179; L 57:369; Western Indemnity Co. v. Rupp, 235 U. S. 261; S 35:37; L 59:220.

See Judgment (§ 633).

[12]Anglo-American Provision Co. v. Davis Provision Co., (No. 2), 191 U. S. 373; S 24:92; L 48:225.

[13]Sistare v. Sistare, 218 U. S. 1; S 30:682; L 54:905. (Alimony decree).

See cases cited under those and other general heads.

[14]Everett v. Everett, 215 U. S. 203; S 30:70; L 54:158; (see at p. 216, last par.). See Comity.

§ 650. A Possible Qualification in Respect of the Federal Common Law Jurisdiction above Referred to.

In a Federal Common Law action, in which the Federal Jurisdiction arises solely by diversity of citizenship, there may, in the course of progress of the suit, arise an issue of law (and of Federal question) of such character, thereby, that if pleadable, and if pleaded, at the outset, it would have supported Federal Jurisdiction by Federal question; and the determination of that issue may prove (and may appear by the record) to have been the dominative basis of the judgment. It may be suggested that, in such situation, the Federal judgment would possibly not be classed, for the purposes in question, as resting upon diversity of citizenship. The suggestion is possibly supported by the Interpretative differentiation in respect of Jurisdiction of a Federal District Court: (a) as such, and (b) not as such;[15] and by a corresponding freedom of Interpretation (see the following Chapter) of the Congressional text now in question, in other aspects of it.

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[15]See Jurisdiction of a Federal Court, as such, (§§ 821-823).

CHAPTER CX.

FAITH AND CREDIT TO JUDGMENTS:—(b) AS AMONG DOMESTIC FORUMS NOT THUS ACTUALLY OR CONVENTIONALLY CO-ORDINATE.[1]

§ 651. General View.

In respect of Federal judgments rendered otherwise than in the Federal Original Common Law Jurisdiction by diversity of citizenship, the Congressional Faith and Credit text cited in the opening section of the preceding Chapter is, in an important degree, controlled and qualified by Federal principles of broader character. We shall, in the present Chapter, consider the operation (as so controlled) of the Congressional text in question: (a) in favor of such Federal judgments; (b) in favor of judgments of a State or of a Federal State; (c) in favor of Federal power of inquiry into judgments of the latter (two-fold) class; and (d) of absence or qualification of converse power in Courts of a State or of a Federal State.

§ 652. Particulars Immediately Above Referred to.

1. Subject to qualifications below in this section considered, the Congressional text in question is broadly operative to the extent of its letter, upon Federal intra-State Courts, of all planes and of all classes, in favor of a judgment of a State or of a Federal State.[2]

2. All Federal intra-State judgments, of the class now in question,[3] are conclusive upon State Courts, (and, a fortiori, upon Courts of Federal States), to all intents, and upon all issues, including the question of jurisdiction.[4]

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[1]For the material Constitutional or Congressional texts, see at the opening of the preceding Chapter.

[2]Wisconsin v. Pelican Ins. Co., 127 U. S. 265; S 8:1370; L 32:239. (State judgment in the Supreme Court in the Original Jurisdiction of that Court; adverse decision upon the merits, but the principle of our text assumed).

[3]I. e., judgments other than Federal Common Law judgments resting, for jurisdiction, upon mere diversity of citizenship.

[4]See ¶ "4", below, and cases cited.

3. A Federal intra-State Court of Equity may (general Jurisdictional conditions being present)[5] entertain a suit, (initially or by Removal), directly seeking annulment or limitation of a State judgment.[6]

Such Federal Equitable Jurisdiction extends, by way of Incident, to limitation (inter partes) of operation, (or of operative effect), of State process supplementary to State judgments: as, levy of execution, or judgment sales; and to annulment of levy or sale title;[7] and to annulment of a Judicial bond given in the course of a State Judicial proceeding in which judgment has been rendered.[8]

Such Federal Judicial power extends to, and as against, State judgments rendered in fields primarily of State Exclusiveness: as, the field of Probate and Administration;[9] and the field of Domestic Relations.[10]

With reference to the qualification in our preceding text: "general Jurisdictional conditions being present," it is hardly necessary to observe: (a) that in such direct Federal inquiry and action in Equity, whether in respect of jurisdiction or of Merits, the Federal jurisdiction, in a particular instance, is dependent upon the presence of general

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[5]As to which, see below.

[6]Byers v. Surget, 19 How. 303; L 15:670; McQuiddy v. Ware, 20 Wall. 14; L 22:311; Gaines v. Fuentes, 92 U. S. 10; L 23:524; White v. Crow, 110 U. S. 183; S 4:71; L 28:113; Johnson v. Waters, 111 U. S. 640; S 4:619; L 28:547; Arrowsmith v. Gleason, 129 U. U. 86; S 9:237; L 32:630; Monger v. Shirley, 131 U. S. (Appendix) cxxxi; L 22:449; Marshall v. Holmes, 141 U. S. 589; S 12:62; L 35:870; Robb v. Vos, 155 U. S. 13; S 15:4; L 39:52; Cowley v. Northern Pac. R. R., 159 U. S. 569; S 16:127; L 40:263; McDaniel v. Traylor, 196 U. S. 415; S 25:369; L 49:533; Johannessen v. United States, 225 U. S. 227; S 32:613; L 56:1066; Louisville & Nashv. R. R. v. Western Un. Tel. Co., 234 U. S. 369; S 34:810; L 58:1356. See Steele v. Culver, 211 U. S. 26; S 29:9; L 53:74.

[7]Pennoyer v. Neff, 95 U. S. 714; L 24:565; Robb v. Vos, 155 U. S. 13; S 15:4; L 39:52; Cooper v. Newell, 173 U. S. 555; S 19:506; L 43:808; Howard v. De Cordova, 177 U. S. 609; S 20:817; L 44:908; Simon v. Southern Ry., 236 U. S. 115; S 35:255; L 59:492.

[8]Griswold v. Hazard, 141 U. S. 260; S 11:972; L 35:678.

[9]Gaines v. Chew, 2 How. 619; L 11:402; Gaines v. Fuentes, 92 U. S. 10; L 23:524; Ellis v. Davis, 109 U. S. 485; S 3:327; L 27:1006; Johnson v. Waters, 111 U. S. 640; S 4:619; L 28:547.

[10]E. g., guardianship of infants: Arrowsmith v. Gleason, 129 U. S. 86; S 9:237; L 32:630.

Federal Jurisdictional conditions;[11] and (b) that,—as matter of definition of Equity (and of Equitable Jurisdiction, as such),—the Federal Jurisdiction in this field is conditioned: first, upon presence of grounds of relief known to general Equity Jurisprudence: as, absence of remedy at law;[12] or fraud;[13] or (in the absence of general Equitable grounds) of exceptional Equitable grounds: (as, multiplicity of parties);[14] and, second, upon absence of grounds fatal (under general principles of Equity Jurisprudence) to Equitable relief: as laches,[15] or unlawful conduct on the (Federal) plaintiff's part, as the cause of the rendering of the (State) judgment against him;[16] or failure to exhaust ordinary remedies:[17] the ordinary remedies usually being (or including), for this purpose, Revisory or direct remedies specifically provided by State law.[18]

4. Courts of a State, (and, a fortiori of a Federal State), are not vested with converse Equity power in respect of such Federal judgments as are now in question,[19] as, (a) a

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[11]E. g., Federal question or diversity of citizenship, and amount. Steele v. Culver, 211 U. S. 26; S 29:9; L 53:74; other cases above cited.

In a particular instance, of course, a Federal question may arise out of the nature of the State judgment, or from Federal character of the parties to it: as in the case of a State decree of naturalization; as in Johannessen v. United States, 225 U. S. 227; S 32:613; L 56:1066.

[12]Hipp v. Babin, 19 How. 271; L 15:633; Ellis v. Davis, cited above: (see p. 503, second par. "The present suit" * * *).

[13]Simmons v. Saul, 138 U. S. 439; S 11:369; L 34:1054: (fraud not sufficiently alleged: see p. 458).

[14]As in Marshall v. Holmes, 141 U. S. 589; S 12:62; L 35:870; McDaniel v. Traylor, 196 U. S. 415; S 25:369; L 49:533.

[15]Simmons v. Saul, cited above: (see p. 460).

[16]McQuiddy v. Ware, 20 Wall. 14; L 22:311.

[17]Tarver v. Tarver, 9 Pet. 174; L 9:91; Randall v. Howard, 2 Bl. 585; L 17:269; Fouvergne v. New Orleans, 18 How. 470; L 15:399; (see p. 473, ad fin.); Gaines v. New Orleans, 6 Wall. 642; L 18:950; (explained, Gaines v. Fuentes, 92 U. S. 10, 21; L 23:524); Broderick's Will, 21 Wall. 503; L 22:599; (explained, Gaines v. Fuentes, cited above, at p. 21); Nougué v. Clapp, 101 U. S. 551; L 25:1026; Ellis v. Davis, cited above.

[18]Farrell v. O'Brien, 199 U. S. 89, 92; S 25:727; L 50:101: "and also the complainants" etc.; and other cases cited above.

[19]I. e., Federal judgments other than Federal Common Law judgments resting, for jurisdiction, upon diversity of citizenship.

Federal judgment in Equity,[20] (the immunity of a Federal judgment in Equity resting partly upon the uniformity of Federal Equitable Jurisprudence throughout the States, and partly upon the power of such a Federal Court of Equity to deal in a revisory or limitative way with its own judgments);[21] or, a fortiori, (b) a Federal judgment in an Exclusive Federal field (as, Admiralty or Bankruptcy); or (c) a Federal Common Law judgment resting, for jurisdiction, upon Federal question.

5. It is obvious that a State Court can have no such power in respect: (a) of a judgment of the Supreme Court, or (b) of a judgment of any forum and of any character, rendered under or confirmed by, a Mandate of that Court.

6. Nothing above stated is qualificatory of power of a Court of a State or of a Federal State, to interpret a Federal judgment, of any character:[22] (the interpretation being, of course, in so far as it involves Federal question, subject to Federal Appellate Review, to the extent of the Congressional Appeal or Error legislation).

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[20]Dowell v. Applegate, 152 U. S. 327; S 14: 611; L 38: 463; Riverdale Mills v. Manufacturing Co., 198 U. S. 188; S 25: 629; L 49: 1008.

[21]See Opinions in cases last cited.

[22]§ 633.

CHAPTER CXI.

Foreign Law, As Fact.

§ 653. The General Principle.

Federal Adoption and application of the Common Law conception of law of a foreign political society as fact, may be illustrated as follows:—

Such law is to be pleaded as fact.[1]

As pleaded, it is admitted, like fact in general, by demurrer.[2]

If a pleader elects to allege such law in the form of allegation of particulars (as, of statutory texts, or of reported decisions) upon which he rests by conclusion, then (under general principles of pleading) his conclusion is open to challenge by demurrer, on the ground of failure, of the particulars alleged, to support the pleader's conclusion.[3]

The allegation is to be sustained by evidence;[4] and (as in other technical fields) the testimony of experts may be invoked.[5]

In respect of Federal Appellate Review, the same principles—affirmative and limitative—apply, as in respect of findings of fact, generally.[6]

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[1]Hanley v. Donoghue, 116 U. S. 1; S 6:242; L 29:535; Eastern Bldg. & Loan Ass'n v. Williamson, 189 U. S. 122; S 23:527; L 47:735; Finney v. Guy, 189 U. S. 335; S 23:558; L 47:839.

[2]Hanley v. Donoghue, cited above; Louisville & Nashv. R. R. v. Melton, 218 U. S. 36; S 30:676; L 54:921.

[3]Eastern Bldg. & Loan Ass'n v. Williamson; Finney v. Guy, both cited above.

[4]Chicago & Alton R. R. v. Wiggins Ferry Co., 119 U. S. 615; S 7:398; L 30:519; Louisville & Nashv. R. R. v. Melton, 218 U. S. 36; S 30:676; L 54:921; other cases, generally, cited in this Chapter.

[5]Slater v. Mexican Nat. R. R., 194 U. S. 120; S 24:581; L 48:900; Eastern Bldg. & Loan Ass'n v. Ebaugh, 185 U. S. 114; S 22:566; L 46:830; other cases cited above.

[6]Blount v. Walker, 134 U. S. 607; S 10:606; L 33:1036; Huntington v. Attrill, 146 U. S. 657; S 13:224; L 36:1123; Chicago & Alton R. R. v. Wiggins Ferry Co.; Eastern Bldg. & Loan Ass'n v. Ebaugh,

For the purposes of the principle, the States of the Union are severally foreign to each other.[7]

The principle under consideration in this Chapter is operative only as between political societies co-ordinate inter se (or co-ordinate as to the field of law in question). It has no operation in a State Court, in respect of Federal law of general character, (such Federal law being Law of the Land in each State);[8] and it has no operation in the District Courts of the United States, in respect of State law, Written or Unwritten; the States severally not being foreign to the United States in its general capacity.[9]

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both cited above; Cuba R. R. v. Crosby, 222 U. S. 473; S 32:132; L 56:274.

[7]Hanley v. Donoghue, cited above; Lloyd v. Matthews, 155 U. S. 222; S 15:70; L 39:128.

[8]See Law of the Land.

[9]Priestman v. United States, 4 Dal. 28; L 1:727; Owings v. Hull, 9 Pet. 607; L 9:246; Pennington v. Gibson, 16 How. 65; L 14: 847; Covington Drawbridge Co. v. Shepherd, 20 How. 227; L 15: 896; Cheever v. Wilson, 9 Wall. 108; L 19:604; Lamar v. Micou, 112 U. S. 452; S 5:221; L 28:751; 114 U. S. 218; S 5:857; L 29:94.

CHAPTER CXII.

FEDERAL JUDICIAL COMITY TOWARD STATE COURTS:—GENERAL VIEW.

§ 654. The General Practice.

We deal at other points with various specific aspects of Federal Comity, Congressional or Judicial, toward the States, severally.[1]

It is proposed, in the present Chapter to refer to certain more general aspects of the matter.

(1) A Federal Court, having acquired jurisdiction of a particular cause, has not power to carry Comity to such an extent as to abandon its such jurisdiction, (without consent of the parties), in favor of a State Court.[2]

(2) A fortiori, there is no principle of State Comity requiring a Federal Court, before entering upon jurisdiction, to await a proposed or possible State Court suit in which a Federal question in issue may arise.[3]

(3) Proper Federal Comity is illustrated in Federal recognition of State law of protection of confidential communications made to a State prosecuting law officer, as such officer.[4]

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[1]See, e. g., Privileges and Immunities (§§ 293, 294); Faith and Credit; Error to State Court (Findings of Fact).

[2]McClellan v. Carland, 217 U. S. 268; S 30:501; L 54:762.

[3]Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278; S 33:312; L 57:510.

[4]Vogel v. Gruaz, 110 U. S. 311; S 4:12; L 28:158.

CHAPTER CXIII.

THE QUESTION OF FEDERAL INJUNCTION AGAINST STATE JUDICIAL PROCEDURE.

§ 655. Federal Injunction Addressed Directly to State Courts or Judges.[1]

It is not competent to a Federal Court other than a Court of Bankruptcy, to address a writ of Injunction to a State Court, or to a State Judge, as such,[2] even in aid of a proceeding in a Federal Bankruptcy Court.[3]

The limitation extends to the Supreme Court, in the exercise of its Appellate Jurisdiction over a State Court,[4] and, it would seem, in its Original Jurisdiction.[5]

The question of definition of a State tribunal as being, or as not being, a (State) Court, within the meaning of the text, is (under general principles) largely, and in general, a question of State law, (commonly of State Judicial Interpretation of State Written law); and the State view is presumptively, and commonly, accepted by the Federal Judiciary, for the purposes in question.[6]

Thus, if a State Railroad Commission is authoritatively defined, by the State Judiciary, as not a Court of Justice, the State definition is Federally accepted; and Federal Injunction lies.[7]

§ 656. Federal Injunction Addressed to Suitors in State Courts.

1. The limitation (considered in the preceding section) upon Federal Injunction addressed to State Courts, does

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[1]As to Injunction addressed to suitors in State Courts, see the following section.

[2]Jud. Code, § 265:—The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

[3]Sargent v. Helton, 115 U. S. 348; S 6:78; L 29:412.

[4]Slaughter-House Cases, 10 Wall. 273; L 19:915: (see p. 298: "Reference is also", etc.).

[5]Ubi supra.

[6]See Following State Judicial Decisions, (§§ 688-697).

[7]Mississippi R. R. Comm. v. Illinois Centr. R. R., 203 U. S. 335; S 27:90; L 51:209.

not extend to suitors in State Courts; but such suitors may be enjoined from proceeding in the State Courts.[8]

2. Such Federal power of Injunction is not limited to proposed or actual parties, but, (pursuant to general principles of Injunction), extends to attorneys or agents, and to State law-officers; and, in the case of such law-officers, it extends to proposed (or actual) suits, Criminal, Penal, or Civil proper, in behalf of the State.[9]

3. Injunction may be limited to some particular feature of a case.[10]

4. Injunction may extend to, and as against, proposed or actual Procedure supplemental to a particular State Court judgment.[11]

5. It may extend to action in a Court of a State outside the Jurisdictional area of the Federal Court in question.[12]

6. The Federal power of Injunction may be exercised through an Ancillary suit, brought, for that purpose, in another Federal Court, of the same, or of another, Federal Jurisdictional area.[13]

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[8]French v. Hay, 22 Wall. 250; L 22:854; Dietzsch v. Huidekoper, 103 U. S. 494; L 26:497; Drexel v. Berney, 122 U. S. 241; S 7:1200; L 30:1219; Griswold v. Hazard, 141 U. S. 260; S 11:972; L 35:678; Marshall v. Holmes, 141 U. S. 589; S 12:62; L 35:870; Julian v. Central Trust Co., 193 U. S. 93; S 24:399; L 48:629; Traction Co. v. Mining Co., 196 U. S. 239; S 25:251; L 49:462; Riverdale Mills v. Manufacturing Co., 198 U. S. 188; S 25:629; L 49:1008; Gunter v. Atlantic Coast Line, 200 U. S. 273; S 26:252; L 50:477; Ex parte Young, 209 U. S. 123; S 28:441; L 52:714; Rickey Land etc. Co. v. Miller & Lux, 218 U. S. 258; S 31:11; L 54:1032.

[9]See under Property; Contract; Franchise; Equal Protection; Inhibition; and the like, (Book V, passim) and cases cited.

For such cases an exceptional Procedure is provided. Jud. Code, § 266, as Amended by Act of March 4, 1913. The requirement as to the number and the status of Judges, is strictly Jurisdictional; and action by a single Judge is a nullity. Ex parte Metropolitan Water Co., 220 U. S. 539; S 31:600; L 55:576.

[10]Drexel v. Berney, cited above: Injunction against presentation by the plaintiff, in the State Court suit, of certain legal grounds of action, not (under rules of Equity) available to him.

[11]E. g., suit upon such a judgment (French v. Hay, cited above); or suit upon a bond given in the State cause originally in question. Dietzsch v. Huidekoper, cited above.

[12]French v. Hay, cited above.

[13]See Ancillary Suit.

7. Federal Injunction, in the field now in question, is, we need hardly observe, conditioned (like Injunction in general) upon absence of ordinary and effectual procedure of relief in other forms,[14] and to Equity requirements, in general.

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[14]E. g., by Removal (Leroux v. Hudson, 109 U. S. 468; S 3:309; L 27:1000); or by Federal Writ of Error. Fitts v. McGhee, 172 U. S. 516; S 19:269; L 43:535; Arbuckle v. Blackburn, 191 U. S. 405; S 24:148; L 48:239.

CHAPTER CXIV.

Competency, and Duty, of State Courts, In General, of Enforcement of Federal Law.[1]

§ 657. The General Question.

We have considered, in an earlier Chapter, from the standpoint, primarily, of Substantive law, the character of Federal law as, within a State, Law of the Land, and law of the State.[2]

The closing clause of the Constitutional text above cited, specifically applies to State Judicial Procedure, the principle considered, in its general aspects, at that earlier point.

The operation of the Constitutional text, in the field of Judicial Procedure is: that apart (a) from Federal law of Criminal or Penal character,[3] and (b) from certain specific Civil non-Penal fields elsewhere considered,[4] a State Court is, (within the field of its general Jurisdiction under the State law), under a Federal duty and obligation of recognition and enforcement of Federal law, whether presented (a) for affirmative enforcement by a plaintiff;[5] or (b) as matter of defence;[6] or (c) as matter of reply to a defence;[7] and none the less where the Federal law in ques-

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[1]Const., Art. VI:—

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[2]See Law of the Land (§§ 89-92).

[3]See Criminal Law; Penal Law.

[4]See Federal Judicial Exclusiveness (§§ 702-704).

[5]General Oil Co. v. Crain, 209 U. S. 211; S 28:475; L 52:754; Second Employers' Liability Cases, 223 U. S. 1; S 32:169; L 56:327.

[6]Kansas City So. Ry. v. Albers Commission Co., 223 U. S. 573; S 32:316; L 56:556; Sioux Remedy Co. v. Cope, 235 U. S. 197; S 35:57; L 59:193; Illinois Centr. R. R. v. Messina, 240 U. S. 395; S 36:368; L 60:709.

[7]Sioux Remedy Co. v. Cope, cited above.

tion is invoked as nullificatory of State Written Law, colorably existing.[8]

In State enforcement of a Federal cause of action, trial by jury is not required by the Federal Organic law, even in respect of causes in which, if tried in a Federal Court, jury trial would (by the Seventh Amendment) be required.[9]

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[8]General Oil Co. v. Crain, cited above: (suit to enjoin a State Inspector from action adverse to the plaintiff, under a State statute asserted to be violative of Federal law); Sioux Remedy Co. v. Cope, cited above: State statute, set up as a defence, challenged by plaintiff as null, by force of Federal law.

See, as to Federal Exclusiveness, §§ 702-704, and cases cited.

[9]Minneapolis & St. Louis R. R. v. Bombolis, 241 U. S. 211; § 36: 595; L 60:961.

CHAPTER CXV.

Finality of Civil Common Law Verdicts.[1]

§ 658. The Question Generally.

1. The first clause of the Constitutional text cited is operative only upon Federal Courts.[2] We are here concerned only with the second clause.

2. In so far as that clause contemplates Federal Courts, it adds nothing to the first clause; since the definition of trial by jury involves the principle of the second clause. As is constantly done, however, for convenience, in the case of Declaratory texts, the clause in question is, in its relation to Federal Courts, commonly treated as enactive of the principle (involved in the first clause): of which it is merely declaratory;[3] and we follow that method of speech below, in speaking of Federal verdicts.

3. The clause extends to State verdicts, where Civil Common Law jury trial is provided for by State law,[4] but only in so far as a State verdict is final under State law.[5]

§ 659. Certain Particulars.

Particulars of operation of the clause in question are as follows:—

(1) It is operative in favor of a State verdict, as against

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[1]Seventh Amendment:—

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

[2]There being (see Due Process of Law) no Federal requirement of jury trial in State Courts.

[3]The Justices v. Murray, 9 Wall. 274; L 19:658.

[4]Cases cited above and below.

As to absence of Federal Constitutional requirement of jury trial in State Courts, see a preceding note.

[5]Thus, if the Procedure law of a given State allows two successive jury trials in ejectment, and one trial is had in a State Court, there may (upon Removal after the first verdict) be a second trial in the Federal Court. Gibson v. Lyon, 115 U. S. 439; S 6:129; L 29:440; Balkam v. Woodstock Iron Co., 154 U. S. 177; S 14:1010, L 38:953; Barber v. Pittsburgh etc. Ry., 166 U. S. 83; S 17:488; L 41:925.

re-examination through or upon Removal to a Federal Court.[6]

(2) It extends to verdicts in Eminent Domain Compensation (Damages) cases,[7] (that field being, pro tanto, of Common Law Procedure character).[8]

(3) It forbids Federal Appellate Review of sufficiency of the weight of the evidence to warrant the verdict;[9] but does not forbid such Review of sufficiency in law, of the evidence, to warrant the verdict.[10]

(4) It forbids a Federal Appellate Court, in reversing, in favor of one party, either a Federal judgment or a State judgment, to order judgment for the other party.[11]

(5) Its operation is uniform, in respect both of Federal Courts and of State Courts; and is, in the latter field, not affected by the view of a particular State.[12]

(6) It is operative, in favor of a State verdict, even where, in the trial, a Federal question was present.[13]

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[6]The Justices v. Murray, cited above.

[7]Chicago, B. & Q. R. R. v. Chicago, 166 U. S. 226; S 17:581; L 41:979. (State verdict).

[8]§§ 517, 722.

[9]Parsons v. Bedford, 3 Pet. 433; L 7:732; Chicago, B. & Q. R. R. v. Chicago, cited above.

[10]Cases last cited.

[11]Slocum v. New York L. Ins. Co., 228 U. S. 364; S 33:523; L 57:879; Young v. Central R. R. of New Jersey, 232 U. S. 602; L 34:451; L 58:750; McGovern v. Philadelphia & Reading R. R., 235 U. S. 389; S 35:127; L 59:283; (the Federal view of the Common Law differing in this field from the view of certain of the States. Cases cited).

[12]Cases last above cited.

[13]The Justices v. Murray, cited above.

CHAPTER CXVI.

CONGRESSIONAL POWER OVER STATE JUDICIAL PROCEDURE.

§ 660. The General Principle.

Pursuant to a broad general principle, Congress may regulate Procedure in State Courts, to such extent as is requisite for efficient operation of Federal law.

The principle is illustrated in the power of Congress to make a Federal Statute of Limitations operative upon State Courts, in respect of issues of Federal character;[1] in affirmative duties imposed upon State Courts, in respect of furthering Removal;[2] in the duty imposed upon State Courts of Faith and Credit to judgments and records of Federal States;[3] in Federal Executive Rules governing State Probate Courts in Indian matters;[4] and in Congressional power—in and through Amnesty legislation—to bar State prosecutions.[5]

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[1]Mitchell v. Clark, 110 U. S. 633; S 4:170; L 28:279.

[2]See Removal. [3]§§ 645-650.

[4]Truskett v. Closser, 236 U. S. 223; S 35:385; L 59:549.

[5]§ 674.

CHAPTER CXVII.

State Incapacity of Ouster, or of Direct Hampering, of Resort to the Federal Original Jurisdiction.

§ 661. The General Principle.

From the propositions: (a) that Federal law, whether of Substance or of Procedure, is Law of the Land within a State;[1] and (b) that definition and delimitation of Federal power in State area is of Exclusive Federal competency, it follows: that a State has no power of ouster or of direct hampering of resort to the Federal Original Jurisdiction.

§ 662. Illustration.

Illustration of the principle above considered may be presented as follows:—

(1) A State cannot (to the end of State Judicial Exclusiveness) make an Extension of a field inherently (as Federally defined and delimited) of State Judicial Exclusiveness.[2]

(2) A State cannot limit to Courts of the State, actions against municipal corporations of the State;[3] or actions for a State-created new actionable tort against private corporations of the State;[4] or compensation suits, under State Eminent Domain Procedure through domestic corporations.[5]

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[1]See Law of the Land (§§ 89-92).

[2]E. g., the field of Probate and Administration. Suydam v. Broadnax, 14 Pet. 67; L 10:357; Union Bank v. Jolly's Adm'rs, 18 How. 503; L 15:472; Hyde v. Stone, 20 How. 170; L 15:874; Green's Adm'x v. Creighton, 23 How. 90; L 16:419; Hess v. Reynolds, 113 U. S. 73; S 5:377; L 28:927; Borer v. Chapman, 119 U. S. 587; S 7:342; L 30:532; Rio Grande R. R. v. Gomila, 132 U. S. 478; S 10:155; L 33:400; Clark v. Bever, 139 U. S. 96; S 11:468; L 35:88.

[3]Cowles v. Mercer County, 7 Wall. 118; L 19:86; Chicot County v. Sherwood, 148 U. S. 529; S 13:695; L 37:546.

[4]Railway v. Whitton, 13 Wall. 270; L 20:571.

[5]Traction Co. v. Mining Co., 196 U. S. 239; S 25:251; L 49:462.

(3) A State cannot effectually provide, as against foreign corporations, for an agreement of ouster of Federal Jurisdiction; and an agreement of such character is void.[6]

(4) A State cannot impose conditions upon Removal of actions; as, by forbidding allegation of requisite diversity of citizenship.[7]

§ 663. The Question of State Power of Indirect Hampering.

It has been held that in the absence of specific action by Congress to the contrary, a State may indirectly hamper resort to the Federal Original Jurisdiction by penalizing actual or attempted resort thereto, by a foreign corporation theretofore admitted (otherwise than as matter of Federal right on its part) to the State; and by exclusion of such corporation from the State for such actual or attempted resort.[8]

In a recent case, however, the Opinion takes the view of the dissenting Opinions in the cases cited.[9]

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[6]Insurance Co. v. Morse, 20 Wall. 445; L 22:365; Barron v. Burnside, 121 U. S. 186; S 7:931; L 30:915.

[7]Harrison v. St. Louis & San Fran. R. R., 232 U. S. 318; S 34:333; L 58:621.

[8]Doyle v. Continental Ins. Co., 94 U. S. 535; L 24:148; (three Justices dissenting); Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246; S 26:314; L 50:545 (two Justices dissenting).

[9]Wisconsin v. Philadelphia & Reading Coal Co., 241 U. S. 329; S 36:563; L 60:1027. The Opinion in this later case does not, however, criticize, in terms, or mention, the cases cited above; and the case is capable, as matter of strict decision, of resting on either of two grounds distinct from the matter now in question: that is to say, (a) the ground of fixed investment as a bar to State exclusion (§ 288); and (b) the suprastate Commerce character of the business of the corporation in question (§ 168).

CHAPTER CXVIII.

The Question of Right of Challenge of Jurisdiction, In Limine.

§ 664. The Subject Generally.

We consider elsewhere the matter of right (as matter of Federal Due Process) of challenge,—in a suit based upon a judgment—of the jurisdiction of the Court by which the judgment was rendered.[1]

It is proposed, in the present Chapter, to consider the question of right of challenge, in a Court of Original Jurisdiction, (in which a suit has been initiated, and prior to judgment), of the jurisdiction of such Court.

The matter has been dealt with at other points (referred to below), but only from particular standpoints. It may be convenient to collate, here, considerations elsewhere presented, and, (with some degree of repetition of what is said elsewhere), thus to deal with the matter in a general way.

The principles of the subject may be stated as follows:—

(1) The specific Constitutional Due Process texts[2] do not vest in one named as a defendant in a purely personal action, right of special appearance, in that action, for the purpose (and the sole purpose) of challenge of jurisdiction of the Court, whether it be a Federal Court or a State Court;[3]—the Federal theory (from the standpoint of the Due Process texts) being: that a personal judgment rendered without jurisdiction of the person named as defendant, is a mere nullity, and—being a nullity—constitutes, at the mere stage of (colorable) judgment, no invasion of such person's rights.[4]

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[1]§§ 644-650; 650, 651. See also § 627, ¶ 7.

[2]Amendment V; Amendment XIV.

[3]York v. Texas, 137 U. S. 15; S 11:9; L 34:604; Kauffman v. Wootters, 138 U. S. 285; S 11:298; L 34:962; Western Indemnity Co. v. Rupp, 235 U. S. 261; S 35:37; L 59:220 (cases upon the Fourteenth Amendment, but applicable to the Fifth Amendment as well).

[4]See cases cited above.

(2) In respect, however, of Federal intra-State Courts of Original Jurisdiction, it is possible that the Judiciary Article of the Constitution, by implication, vests such right, to a greater or less degree, in respect of Federal Jurisdiction as such: that is to say—Federal as distinguished from general Jurisdiction,—at least where the challenge of jurisdiction is rested upon a question of Constitutional limitation of Federal Jurisdiction. The Federal Congressional and Judicial course of action and practice, however, have been such[5] that the question has not arisen.

(3) In such Federal Courts, not only has such challenge always been allowed, (broadly, and upon any ground), but the Court is under the duty of taking notice, sua sponte, of absence of jurisdiction in a strict sense of the term.[6]

(4) Right of such special appearance to challenge jurisdiction exists, as matter of Congressional policy, in respect of Courts in Federal areas.[7]

(5) In respect of purely personal actions[8] in State Courts, a State is at liberty to deny privilege of such special appearance and such challenge, or to couple with exercise of such challenge any conditions, at pleasure: as, that of submission to the jurisdiction, if the challenge is held, by the State Courts, to be unfounded.[9]

(6) Nothing said above in favor of State practice and State power has any application to the situation where a suit in a State Court is not purely personal, but the State Court, either at the inception of, or pending, the suit, takes possession of property (corporeal or incorporeal) of the person named as defendant, in such manner as, in any ma-

[5]See the succeeding paragraph.

[6]§§ 712, 713.

It is not competent to a District Court to provide, by Rule, that one named as defendant, and appearing specially to object to jurisdiction, must, as a condition of being heard upon that point, stipulate to enter a general appearance, and not resort to Appeal or Error, if his Jurisdictional contention is overruled by the District Court. Davidson Marble Co. v. Gibson, 213 U. S. 10; S 29:324; L 53:675.

[7]Harkness v. Hyde, 98 U. S. 476; L 25:237: dealing with a locally established Court of a Territory, but, (in view of the latitude allowed to the self-governing Federal States in matters of Judicial Procedure), (§ 56), applicable, a fortiori, to a Congressionally established Court in Federal area.

[8]As defined ¶ (1) supra, note.

[9]Cases cited above, under (1).

terial degree, to exclude such person from possession or enjoyment thereof; but, in such situation, there comes into operation, not merely that Judicial Procedure aspect, but the "property" text of the Fourteenth Amendment; and that text vests in such person right of special appearance for challenge of jurisdiction over the property, without subjecting himself or the property to the jurisdiction of the Court, in case of overruling by that Court of his challenge of the jurisdiction; the situation being the same, in principle, as that of seizure of property after judgment, (as, upon execution).

BOOK VIII.

CERTAIN GENERAL FEATURES OF FEDERAL JUDICIAL PROCEDURE.

PART I.—The Judicial Code.—Jury Trial.—Criminal Procedure other than Jury Trial.—Transition to Statehood.

PART II.—Federal Question:—Amount:—State Decisions.

PART I.

THE JUDICIAL CODE.—JURY TRIAL.—CRIMINAL PROCEDURE OTHER THAN JURY TRIAL.—TRANSITION TO STATEHOOD.

CHAPTER CXIX.

THE JUDICIAL CODE.

§ 665. General Character.

The Act of March 3, 1911,[1] (since Amended) is self-designated as "The Judicial Code";[2] and, for convenience, we shall henceforth refer to it by that designation. It is Title XIII of the Revised Statutes, in Amended form, and constantly designates itself as a "Title", in that sense.[3] It, in terms,[4] states itself to be a codification; and is to be construed as such;[5] and decisions upon earlier texts embraced in this codification, are pertinent to the corresponding texts of the Judicial Code.

The Code does not undertake to deal exhaustively with the field with which it is concerned; but leaves in force such Congressional texts as it does not, in terms or by necessary implication, repeal or qualify.[6]

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[1]36 Stats., Ch. 231; 36 Stats. at Large, 1087-1169.

[2]SEC. 296. This Act may be designated and cited as "The Judicial Code."

[3]SEC. 293:—* * * the words "this title," wherever they occur herein, shall be construed to mean this Act.

[4]§§ 294, 295.

[5]See, in particular, Cain v. Commercial Pub'g Co., 232 U. S. 124; S 34:284; L 58:534.

[6]Chapter XIV, of the Code (Repealing provisions); Petri v. Creelman Lumber Co., 199 U. S. 487; S 26:133; L 50:281; United States v. Dalcour, 203 U. S. 408; S 27:58; L 51:248.

CHAPTER CXX.

TRIAL BY JURY.[1]

§ 666. Provisions and Principles Common to Civil and Criminal Causes.

Jury provisions common to Civil and Criminal causes, are: the fixed number of twelve jurors;[2] unanimity in the verdict;[3] full and complete submission to the jury of all issues of fact,[4] including issues of reasonableness and the like;[5] trial in the presence of, and under the superin-

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[1]Const., Art. III, § 11:—

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Sixth Amendment:—

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Seventh Amendment:—

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

As to (a) operativeness of these jury requirements throughout the United States proper, but (b) only upon Federal Courts; and (c) nonoperativeness in Foreign Possessions and in Federal Consular Courts etc. abroad, see §§ 24, 81, 668.

[2]American Publishing Co. v. Fisher, 166 U. S. 464; S 17:618; L 41:1079; Springville v. Thomas, 166 U. S. 707; S 17:717; L 41:1172; Thompson v. Utah, 170 U. S. 343, 349; S 18:620; L 42:1061; Capital Traction Co. v. Hof, 174 U. S. 1, 13; S 19:580; L 43:873; Maxwell v. Dow, 176 U. S. 581, 586; S 20:448; L 44:597.

[3]Cases cited.

[4]Hodges v. Easton, 106 U. S. 408; S 1:307; L 27:169.

[5]Atlantic & Pac. Tel. Co. v. Philadelphia, 190 U. S. 160; S 23:817; L 47:995.

tendence of, a Judge empowered to instruct the jury upon the law, and to discuss, for their benefit, the evidence,[6] and to give his opinion of the facts;[7] permissibility of discharge of a jury, upon failure to agree; and of new trial before another jury;[8] permissibility of calling in talesmen de circumstantibus;[9] and absence of right of jury trial of preliminary or incidental issues, concerned with mere Procedure and not with the Merits of the cause.[10]

§ 667. Civil Causes.

Features of jury trial relating only to Civil causes are:
definition of the term "common law", as used in the Seventh Amendment;[11]
permissibility of trial without a jury, in the first instance, with right of appeal and of jury trial on appeal;[12]
permissible submission of specific issues; and controlling effect of finding thereon, over a general verdict inconsistent with them;[13]
incompetency, (without waiver authorized by statute), of the Court, to try issues of fact;[14]

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[6]Capital Traction Co. v. Hof, 174 U. S. 1, 13; S 19:580; L 43:873.

[7]Lovejoy v. United States, 128 U. S. 171; S 9:57; L 32:389.

[8]Thompson v. United States, 155 U. S. 271; S 15:73; L 39:146.

[9]Lovejoy v. United States, cited above; St. Clair v. United States, 154 U. S. 134, 146; S 14:1002; L 38:936.

[10]E. g., in a Criminal cause, of issues material only to extent or particulars of punishment: as, upon value of goods, where punishment is fixed by law according to value of property in question. United States v. Tyler, 7 Cr. 285; L 3:344: (prosecution for violation of embargo, the punishment fixed by law being a fine of four times the value of the goods in question).

[11]Parsons v. Bedford, 3 Pet. 433; L 7:732; Ex parte Wall, 107 U. S. 265, 288; S 2:569; L 27:552; (not inclusive of Disbarment Procedure); Guthrie Bank v. Guthrie, 173 U. S. 528, 537; S 19:513; L 43:796: (not inclusive of a statutory suit for enforcement, under statute, against municipal corporations of mere meritorious, not strictly legal, obligations).

[12]Capital Traction Co. v. Hof, 174 U. S. 1; S 19:580; L 43:873.

[13]Walker v. Southern Pac. R. R., 165 U. S. 593; S 17:423; L 41:837.

[14]Kearney v. Case, 12 Wall. 275; L 20:395; Morgan's Ex'or v. Gay, 19 Wall. 81; L 22:100; Paine v. Central Vermont R. R., 118 U. S. 152; S 6:1019; L 30:193: the Judge being, in such situation, a mere referee. Cases cited.

permissibility of waiver of jury trial, in the discretion of the Legislative Branch;[15]

non-equivalency of Equity issues, tried by a jury, to a Common Law jury trial;[16]

absence of right to go to a jury (a) upon a mere scintilla of evidence;[17]

or (b) upon evidence such, in the opinion of the presiding Judge, that a verdict would be set aside on a motion for a new trial;[18]

power of the trial Judge to order a verdict for the plaintiff, if the evidence in his favor is, in law, sufficient, and is uncontradicted and not seriously challenged on other grounds;[19]

a fortiori, power of the trial Judge to direct a non-suit or a verdict for the defendant, where the evidence for the plaintiff is insufficient as matter of law;[20]

inapplicability of the Constitutional text cited, to issues of law;[21]

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[15]Stanley v. Supervisors of Albany, 121 U. S. 535; S 7:1234; L 30:1000; Schick v. United States, 195 U. S. 65; S 24:826; L 49:99 (a Penal Civil action).

Act of March 3, 1865 (13 Stat. 501):—

> Issues of fact in civil cases in any circuit [now district] court may be tried and determined by the Court without the intervention of a jury, whenever the parties, or their attorneys of record file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.

The statute cited is strictly construed in respect of the identity in legal character and effect of a finding by the Court, and the verdict (or special findings) of a jury. Grayson v. Lynch, 163 U. S. 468; S 16:1064; L 41:230; St. Louis v. Western Un. Tel. Co., 166 U. S. 388; S 17:608; L 41:1044.

[16]Cates v. Allen, 149 U. S. 451, 459; S 13:883; L 37:804.

[17]Improvement Co. v. Munson, 14 Wall. 442; L 20:867; Pleasants v. Fant, 22 Wall. 116; L 22:780; Commissioners v. Clark, 94 U. S. 278; L 24:59.

[18]Herbert v. Butler, 97 U. S. 319; L 24:958; Treat Mfg. Co. v. Standard Steel Co., 157 U. S. 674; S 15:718; L 39:853.

[19]Grand Chute v. Winegar, 15 Wall. 355; L 21:170.

[20]Coughran v. Bigelow, 164 U. S. 301; S 17:117; L 41:442.

[21]Interstate Com. Comm. v. Brimson, 154 U. S. 447, 488; S 14:1125; L 38:1047.

absence, in Equity and Admiralty, of right of jury trial, even upon issues of Common Law character, arising collaterally in those fields;[22]
and absence of such right in Eminent Domain compensation ("damages") issues in a Federal Court.[23]

§ 668. Criminal Causes.

Features of jury trial, relating peculiarly to Criminal causes, are:
inclusion by the Constitutional texts: (a) of offences such in character as were triable by jury at the Common Law; and, therefore, of all such offences as are, by Congress, treated as serious, from the standpoint of potential punishment;[24]
but not (b) of petty offences;[25]
adoption, in substance, (for State area), by the Venue provisions of the Constitution,[26] of the Common Law principles of trial by the vicinage, (with substitution of the State, and the Federal District, for the Common Law county);
non-applicability of such Venue provisions to crimes committed in intra-State Federal area;[27]
absence of right of jury trial in a Federal Court in strictly Foreign area;[28]
absence of such right in Criminal Contempt;[29]
right, (where right of jury trial exists), to jury trial in the first instance, and not merely in a second trial, upon appeal;[30]

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[22]Barton v. Barbour, 104 U. S. 126, 133; L 26:672. See Collateral Issues (§§ 575, 576).

[23]Bauman v. Ross, 167 U. S. 548; S 17:966; L 42:270: (statutory "jury" of seven, which is not a Common Law "jury"). See Eminent Domain (Judicial Procedure).

As to finality of a Common Law verdict (Federal or State) see §§ 658, 659.

[24]Callan v. Wilson, 127 U. S. 540; S 8:1301; L 32:223.

[25]United States v. Gale, 109 U. S. 65; S 3:1; L 27:857; Callan v. Wilson, (cited above), at pp. 553, 555; Schick v. United States, 195 U. S. 65, 68 et seq.; S 24:826; L 49:99.

[26]Const., Art. III, § II; Sixth Amendment.

[27]United States v. Dawson, 15 How. 467, 487; L 14:775; Cook v. United States, 138 U. S. 157; S 11:268; L 34:906.

[28]As, in a Federal Consular Court in a Foreign country. In re Ross, 140 U. S. 453; S 11:897; L 35:581.

[29]Gompers v. United States, 233 U. S. 605; S 34:693; L 58:1115.

[30]Callan v. Wilson, cited above: the Federal view of the Common

right, in some reasonable degree, of peremptory challenge,[31] (particulars of right of challenge being left to Legislative discretion, within reasonable limits);[32]
and disqualification of a juror, by such close relations with the Government as would presumptively involve bias against the defendant.[33]

Law differing, in this respect, from that of certain of the States in their dealing with State Constitutional adoption of jury trial.

[31]Lewis v. United States, 146 U. S. 370; S 13:136; L 36:1011; Pointer v. United States, 151 U. S. 396; S 14:410; L 38:208; St. Clair v. United States, 154 U. S. 134, 148; S 14:1002; L 38:936.

[32]United States v. Shackleford, 18 How. 588, 590; L 15:495; Pointer v. United States, cited above; Reagan v. United States, 157 U. S. 301; S 15:610; L 39:709.

[33]See Crawford v. United States, 212 U. S. 183; S 29:260; L 53:465.

CHAPTER CXXI.

Criminal Procedure Other Than Jury Trial.

§ 669. Grand Jury.[1]

The requirement of indictment by a grand jury did not, at the Common Law, extend to minor offences; and the limitation of the text cited to "capital or otherwise infamous crimes" must be understood to be an adoption of the Common Law principle, with adaptation thereof to conditions existing, at a given period, in this country. The definition, therefore, of "infamous" crime, is, within limits, left by the Constitution, to Congressional discretion,[2] subject to Revisory control by the Judiciary Branch.[3]

The Federal law adopts, for Federal Courts, within the United States proper, the Common Law conception, definition, limitations and material particulars of the grand jury.[4]

§ 670. Committing-Magistrates.

The grand jury text (cited above) of the Fifth Amendment, deals only with Courts having power of conviction, and not with mere committing-magistrates, (as, a United States commissioner): leaving such magistrates, and their

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[1]Fifth Amendment:—No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.

As to operativeness of the grand jury requirement, (a) throughout the United States proper; but (b) only upon Federal Courts; and (c) non-operativeness in Foreign Possessions, and in Federal Consular Courts, etc. abroad, see §§ 24, 81, 561, 668.

[2]United States v. Gale, 109 U. S. 65; S 3:1; L 27:857; Ex parte Wilson, 114 U. S. 417; S 5:935; L 29:89; Mackin v. United States, 117 U. S. 348; S 6:777; L 29:909; Parkinson v. United States, 121 U. S. 281; S 7:896; L 30:959.

[3]Cases cited.

[4]Reynolds v. United States, 98 U. S. 145; L 25:244; Clawson v. United States, 114 U. S. 477; S 5:949; L 29:179; Ex parte Bain, 121 U. S. 1; S 7:781; L 30:849; Agnew v. United States, 165 U. S.

duties, and powers, to the discretion of the Legislative Branch.[5]

§ 671. **Criminal Pleading.**

The Federal law tacitly adopts the Common Law principles of Criminal Pleading: as, of pleading an offence in two or more counts, with operativeness of a general verdict of guilty, if any count is good;[6] separability, to certain intents, of counts, after a general verdict of guilty;[7] and interpretation of general language, as being limited, in legal effect, to the proper Jurisdictional area.[8]

§ 672. **Procedure, Generally, after Indictment or Information.**

Illustration of Federal application of Common Law principles in Procedure after indictment (or after information, where information is sufficient) is seen in the matters of punishment;[9] of definition of power of a United States attorney in respect of granting immunity;[10] of immateriality of mere irregularities;[11] of bail;[12] of evidence, in general;[13] of Criminal Contempt (and of definition of Contempt as of Criminal or of Civil character);[14] and of the

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36; S 17:235; L 41:624; Queenan v. Oklahoma, 190 U. S. 548; S 23:762; L 47:1175; Crowley v. United States, 194 U. S. 461; S 24:731; L 48:1075; Kaizo v. Henry, 211 U. S. 146; S 29:41; L 53:125; Hendricks v. United States, 223 U. S. 178; S 32:313; L 56:394; Powers v. United States, 223 U. S. 303; S 32:281; L 56:448.

[5]Ex parte Hennen, 13 Pet. 230; L 10:136; Todd v. United States, 158 U. S. 278; S 15:889; L 39:982.

[6]Evans v. United States, 153 U. S. 584; S 14:934; L 30:830; Goode v. United States, 159 U. S. 663; S 16:136; L 40:297.

[7]Ballew v. United States, 160 U. S. 187; S 16:263; L 40:388: (upon general verdict of guilty, and verdict thereon, judgment affirmed upon one count, and new trial ordered on another count, upon Error). See also Blitz v. United States, 153 U. S. 308; S 14:924; L 38:725.

[8]St. Clair v. United States, 154 U. S. 134; S 14:1002; L 38:936.

[9]Dimmick v. Tompkins, 194 U. S. 540; S 24:780; L 48:1110 (detention in jail, pending supersedeas and review, not counted as part of the sentence time).

[10]Whiskey Cases, 99 U. S. 594; L 25:399.

[11]Iasigi v. Van de Carr, 166 U. S. 391; S 17:595; L 41:1045; Dallemagne v. Moisan, 197 U. S. 169; S 25:422; L 49:709.

[12]United States v. Ryder, 110 U. S. 729; S 4:196; L 28:308.

[13]Many cases, not necessary to be cited.

[14]O'Neal v. United States, 190 U. S. 36; S 23:776; L 47:945; Sawyer v. United States, 202 U. S. 150; S 26:575; L 50:972; United

distinction between the Civil and the Criminal aspects of Quo Warranto.[15]

§ 673. Presence of the Accused at the Trial:—Confrontation.

The matters: (a) of requirement of the presence of the accused at the trial; and (b) of right of confrontation with the witnesses against him,[16] run very close together. The former matter is not, in terms, dealt with by the Constitution; but the Common Law principle of right of presence at the trial, in all cases of serious importance, is tacitly (or by implication from the confrontation text, cited above) adopted by the Federal Organic law,[17]—the trial including, for this purpose, (a) trial of issues raised by challenge; and (b) the passing of sentence.[18]

The text cited adopts the Common Law principles of the subject.[19]

The confrontation text excludes written testimony given at a preliminary examination,[20] and, a fortiori, ex parte affidavits.[21]

§ 674. Self-Incrimination.[22]

The text cited adopts the Common Law of the subject.[23]

The Common Law practice, in this respect, originated

States v. Shipp, 214 U. S. 386; S 29:637; L 53:1041; 215 U. S. 580; S 30:403; L 54:1213; Gompers v. Bucks Stove Co., 221 U. S. 418; S 31:492; L 55:797; In re Merchants' Stock Co., 223 U. S. 639; S 32:339; L 56:584; Grant v. United States, 227 U. S. 74; S 33:190; L 57:423.

[15]Standard Oil Co. v. Missouri, 224 U. S. 270, 282 et seq.; S 32:406; L 56:760.

As to certain other matters, see succeeding sections.

[16]Sixth Amendment:—* * * to be confronted with the witnesses against him, * * *

[17]Hopt v. Utah, 110 U. S. 574; S 4:202; L 28:262; Ball v. United States, 140 U. S. 118; S 11:761; L 35:377; Lewis v. United States, 146 U. S. 370; S 13:136; L 36:1011.

[18]Cases cited.

[19]Cases cited; Reynolds v. United States, 98 U. S. 145; L 25:244. See Diaz v. United States, 223 U. S. 442; S 32:250; L 56:500.

[20]Motes v. United States, 178 U. S. 458; S 20:993; L 44:1150.

[21]Dowdell v. United States, 221 U. S. 325; S 31:590; L 55:753: (a case upon the "Philippine Bill of Rights").

[22]Fifth Amendment:—

> * * * nor shall any person * * * nor shall be compelled in any criminal case to be a witness against himself * * *

[23]Cases cited below.

as a mere rule of Evidence, established by the Courts, of their own motion, out of deference to public opinion.[24]

Prior to the Constitution of the United States, the States had, very generally, embodied this Common Law rule of practice in their Bills of Rights, and thereby made it State Organic law.[25]

The Fifth Amendment deals only with Federal action; and it is optional with a State to adopt and follow the Common Law practice, in this regard, or not.[26] At the Common Law, the rule was applied only where the prosecution to which the witness might be subjected was a prosecution within the same political jurisdiction in which the witness was being examined.[27] The Fifth Amendment is, however, (in view of our dual political system), operative in a Federal Court, as against disclosures tending to support a prosecution in a State Court.[28]

The practice was not applied by the House of Lords, in Impeachment trials.[29]

Where only Federal Jurisdictions are involved, Pardon or Amnesty—by removing the possibility of prosecution—removes the operation of the Sixth Amendment.[30]

Pardon or Amnesty, however, to be thus operative, must be broad and complete, and must cover indirect use of the testimony.[31]

Congress has power, in Amnesty legislation to this end, to bar State prosecutions;[32] and a Congressional Amnesty Act, general in terms, will be construed as so operative:

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[24]Brown v. Walker, 161 U. S. 591, 596; S 16:644; L 40:819.

[25]Case cited, at pp. 591, 597.

[26]Jack v. Kansas, 199 U. S. 372; S 26:73; L 50:234.

[27]See Jack v. Kansas, (cited above), at pp. 381, 382.

[28]United States v. Saline Bank, 1 Pet. 100; L 7:69: (Discovery, in Equity, denied, in a Court of the United States, on the ground that it would subject the defendant to State prosecution).

[29]Brown v. Walker, (cited above) at p. 597.

[30]Brown v. Walker, cited above.

[31]Counselman v. Hitchcock, 142 U. S. 547; S 12:195; L 35:1110.

[32]Stewart v. Kahn, 11 Wall. 493; L 20:176; Brown v. Walker, (cited above), at pp. 606, 607; Hale v. Henkel, 201 U. S. 43; S 26: 370; L 50:652.

construction to that effect being essential to the object of the Act.[33]

As at the Common Law, so in the Federal Procedure, the privilege must be claimed at the time when the testimony is asked for; if not made then, it is waived.[34]

As at the Common Law, so in Federal Procedure, there must be reasonable color for setting up the exemption.[35]

When the character of evidence sought (as, or as not, incriminatory of the witness), includes and involves production of books or papers, the books and papers are to be submitted provisionally to the Court.[36]

The privilege, being limited to persons capable of being witnesses, is limited to natural persons; and does not extend to corporations.[37]

The privilege is limited to witnesses in their individual capacity, and does not, for example, extend to a witness in his capacity as agent of a corporation;[38] and does not protect him against a property or possessory right, higher than his own, in books or papers. When, for example, the title to books and papers passes from him, (as, under an assignment in Bankruptcy), the mere fact that the contents of the books or papers tend to criminate him is no bar

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[33]Brown v. Walker, cited above.

For an Act of Congress not amounting to an Amnesty Act, see Burrell v. Montana, 194 U. S. 572; S 24:787; L 48:1122.

As to right under Amnesty, as distinguished from the non-Incrimination privilege, see Heike v. United States, 227 U. S. 131; S 33:226; L 57:450.

[34]See Burrell v. Montana, cited above.

[35]Ballman v. Fagin, 200 U. S. 186; S 26:212; L 50:433: (facts discussed, by the Court, from this point of view, and held sufficient).

[36]See Consolidated Rendering Co. v. Vermont, 207 U. S. 541; S 28:178; L 52:327.

[37]Wilson v. United States, 221 U. S. 361; S 31:538; L 55:771; American Lithographic Co. v. Werckmeister, 221 U. S. 603; S 31:676; L 55:873; Baltimore & O. R. R. v. Interstate Com. Comm., 221 U. S. 612; S 31:621; L 55:878; Wheeler v. United States, 226 U. S. 478; S 33:158; L 57:309. See Dreir v. United States, 221 U. S. 394; S 31:550; L 55:784; Grant v. United States, 227 U. S. 74; S 33:190; L 57:423.

[38]Wilson v. United States; Baltimore & O. R. R. v. Interstate Com. Comm., both cited above.

to the right of the new owner to demand from him possession of them, and to use them in evidence.[39]

So, where, as between the United States and a certain corporation, the United States is entitled to the possession of the corporation's books and papers, (as, for use in a proceeding against the corporation), an agent of the corporation, having custody of the books and papers, cannot refuse to produce them on the ground that they tend to incriminate such agent, personally.[40]

Where a defendant in a Criminal prosecution has made to the public prosecuting law officers a written statement under circumstances such as to forbid the use of it against him, mere retention by such officers of the statement is not within the prohibition of the Amendment.[41]

§ 675. Papers and Other Evidential Things.[42]

It would appear that evidential papers and other effects, unlawfully seized, are none the less, on that account, admissible in evidence against the owner, if no specific objection is made, on that ground, at the trial.[43]

It is, however, competent to such person, by proper direct procedure, to prevent the use of such material by the United States against him.[44]

§ 676. Double Jeopardy and Prior Acquittal or Conviction.[45]

The text cited adopts the Common Law definition and

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[39]Matter of Harris, 221 U. S. 274; S 31:557; L 55:732; Johnson v. United States, 228 U. S. 457; S 33:572; L 57:919.

[40]Dreir v. United States; Grant v. United States, both cited above.

[41]Pendleton v. United States, 216 U. S. 305; S 30:315; L 54:491: (under the so-called "Philippine Bill of Rights").

[42]Fourth Amendment:—

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

[43]Adams v. New York, 192 U. S. 585; S 24:372; L 48:575.

[44]Weeks v. United States, 232 U. S. 383; S 34:341; L 58:652.

[45]Fifth Amendment:—

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *

So, see certain Congressional legislation to the same effect in re-

principles of Double Jeopardy, and of Prior Acquittal or Conviction.[46]

§ 677. Other Matters.

In fields not above specifically considered, the Federal Organic law, and the Federal non-Organic law, in their respective fields, adopt the Common Law: as, in respect of bail, as between different States;[47] of Pardon;[48] of confidential communications to a Federal prosecuting law officer;[49] and of disregard, to certain intents, of invalidity of arrest of a defendant.[50]

§ 678. Aliens.

The Constitutional Criminal Procedure texts extend to Aliens.[51]

§ 679. Potential Federal Adoption of State Criminal-Procedure Law.

It is competent to Congress to differentiate, and to localize, the Federal law of Criminal Procedure, by adopting, within limits prescribed above, State Criminal-Procedure law.[52]

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spect of Foreign Possessions, etc., as, in the "Philippine Bill of Rights," so called.

[46]United States v. Perez, 9 Wh. 579; L 6:165; Nielsen, Pet'r, 131 U. S. 176; S 9:672; L 33:118; Kepner v. United States, 195 U. S. 100; S 24:797; L 49:114; Trono v. United States, 199 U. S. 521; S 26:121; L 50:292; Flemister v. United States, 207 U. S. 372; S 28:129; L 52:252; Keerl v. Montana, 213 U. S. 135; S 29:469; L 53:734; Gavieres v. United States, 220 U. S. 338; S 31:421; L 55:489; Diaz v. United States, 223 U. S. 442; S 32:250; L 56:500.

[47]Taylor v. Taintor, 16 Wall. 366; L 21:287.

[48]Burdick v. United States, 236 U. S. 79; S 35:267; L 59:476.

[49]Vogel v. Gruaz, 110 U. S. 311; S 4:12; L 28:158.

[50]See Dallemagne v. Moisan, 197 U. S. 169; S 25:422; L 49:709.

[51]See Wong Wing v. United States, 163 U. S. 228; S 16:977; L 41:140.

[52]As, in respect of punishment. Motes v. United States, 178 U. S. 458; S 20:993; L 44:1150; Rakes v. United States, 212 U. S. 55; S 29:244; L 53:401; United States v. Mason, 213 U. S. 115; S 29:480; L 30:725. See Equal Protection of the Laws, §§ 497; 498 ad init.

CHAPTER CXXII.

JUDICIAL PROCEDURE IN TRANSITION TO STATEHOOD.[1]

§ 680. General Principles.

Congress may, in a Statehood Act, provide for the transfer from the local Federal Courts, to State Courts of the new State, of such pending causes as would naturally go to State Courts; and of other pending causes to Courts of the United States to be established in the new State; and this in respect not only of Civil, but of Criminal, causes,[2]—remitting to the State Courts pending or potential prosecutions for past violations of local law of the Federal area, and to Courts of the United States such prosecutions for past violations of general Federal law.[3]

In a variety of ways, such power of Congress is defined and limited by Federal Organic law. The operation of such Organic law in this field is illustrated in the matter of Criminal Procedure. Thus, in and for any Federal area within the United States,[4] the Constitution of the United States (a) secures the right of Common Law jury trial, and (b) forbids, ex post facto legislation, Congressional or State, in derogation of that right; and therefore, if a pending (or a potential) prosecution be remitted to Courts of a new State, Common Law jury trial in such a Court is essential;[5] and, pari ratione, if the prosecution is begun in a State Court, the grand jury requirement of the Sixth Amendment is operative.

In the case of pending Appeal or Error, Congress may make corresponding provision. Thus, if at the time of transition, Appeal or Error be pending to the Supreme

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[1]See §§ 82-88.

See Jud. Code, §§ 62-64.

[2]Pickett v. United States, 216 U. S. 456; S 3:265; L 54:566; Southern Surety Co. v. Oklahoma, 241 U. S. 582; S 36:692; L 60:1187.

[3]Cases cited.

[4]As to Federal area not within the United States, in the strict sense, see Foreign Possessions.

[5]Thompson v. Utah, 170 U. S. 343; S 18:620; L 42:1061.

Court of the United States, Congress may provide for preservation thereof; and for Mandate, by the Supreme Court, (in case of a suit of exclusive Federal Judicial competency), to a Court of the United States, in the new State, as a substitute for the original Territorial Court;[6] or, in a matter of State Judicial competency, to a Court of the new State.[7]

Where Congress makes no affirmative provision on the subject of Appeal or Error, none is inferred; and Appeal or Error lapses.[8] In respect of particulars, Congress may enact retroactive Curative legislation.[9]

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[6]The Blue Jacket, 144 U. S. 371; S 12:711; L 36:469.

[7]Freeborn v. Smith, 2 Wall. 160; L 17:922.

For a detail of Judicial Procedure, upon Transition, (in transfer of pending Civil suits to Courts of the new State), see Dill v. Ebey, 229 U. S. 199; S 33:620; L 57:1148.

[8]Hunt v. Palao, 4 How. 589; L 11:1115; Freeborn v. Smith, (cited above), at p. 175; Benner v. Porter, 9 How. 235; L 13:119; McNulty v. Batty, 10 How. 72; L 13:333; Preston v. Bracken, 10 How. 81; L 13:336.

[9]E. g., to cure an omission to provide for pending Appeal or Error to the Supreme Court of the United States. Freeborn v. Smith, cited above. See Steinfeld v. Zechendorf, 239 U. S. 26; S 36:14; L 60:125.

PART II.

FEDERAL QUESTION.—AMOUNT.—STATE DECISIONS.

CHAPTER CXXIII.

FEDERAL QUESTION AS JURISDICTIONAL.[1]

§ 681. The Texts Cited, Generally.

The Constitutional text cited above, employs the term "cases" in a broad sense, including "issues."[2]

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[1]Const., Art. III, § 7:—

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * *

Jud. Code, § 24:—

> The district courts shall have original jurisdiction * * * of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy * * * arises under the Constitution or laws of the United States, or treaties.

§ 28:—

> Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. * * *

A mere variant (see our § 795, ¶ 4) is: the closing clause of the second paragraph of Judicial Code, § 237, as Amended by Act of Sept. 6, 1916:—

> * * * or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute, of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority * * *

Certain other Congressional texts make certain specific issues of Federal law Jurisdictional (i. e., conditions of Federal Jurisdiction): as, in the case of texts dealing with Federal Review of judgments of State Courts. In dealing with such texts, we, in some instances, employ the term "Federal question" in a narrower sense, limited to the particular text under consideration.

[2]§§ 580-583. See, also, Separable Controversy.

While the Congressional texts cited follow closely the corresponding language of the Constitutional text cited; they are not of the same breadth as the Constitutional text, but employ corresponding language in a narrower, and in a conventional, sense.[3]

§ 682. Affirmative Aspects of the Congressional Texts.

1. The expression "laws of the United States," in the Congressional texts cited, and other more general expressions, in such texts, referring to Federal law,[4] are not limited in scope to Written law, but extend to Unwritten Federal law.[5]

2. The expression "laws of the United States," in such texts, embraces non-Organic law of (or peculiar to) a Federal area, in so far as of extra-areal operation.[6]

3. Such texts embrace questions of particulars of the Federal political structure, as, a question of Federal citizenship of a particular person.[7]

4. Such texts extend to questions dealing closely with efficiency of operation of the Federal governmental machinery.

Thus, a suit upon the bond of a United States marshal, for alleged wrongful attachment of goods under Federal Judicial process, presents, on the face of the record, a Federal question.[8]

So, of a suit by a private beneficiary, upon the bond of

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[3]See succeeding sections of this Chapter.

[4]As "authority exercised under the United States."

[5]As, definition (a) of the Plenary Federal Sovereignty based upon Federal area; (b) of Immunity of the United States as against State action; (c) of Treaty power (such in effect) as between the United States and a State; (d) of State Sovereignty as between or as among States; (e) of scope of operation of the Constitution in and in respect of Foreign Possessions of the United States and of their inhabitants. See cases cited under such, and like heads, of Unwritten Federal Law.

[6]Cohens v. Virginia, 6 Wh. 264; L 5:257; (Opinion and judgment upon jurisdiction, pp. 375-430); El Paso etc. Ry. v. Gutierrez, 215 U. S. 87; S 30:21; L 54:106; Creswill v. Knights of Pythias, 225 U. S. 246; S 32:822; L 56:1074; Knights of Pythias v. Mims, 241 U. S. 574; S 36:702; L 60:1179.

As to the reverse of the principle, where there is no extra-areal operation, see § 684, ¶ 9.

the Clerk of a Court of the United States,[9] or upon a Federal supersedeas bond.[10]

So of a suit to enforce a Federal judgment, where its Federal character is involved,[11] or to give the proper interpretation and effect thereto, in its such aspect.[12]

So, in an action in a State Court upon a Judicial bond given in a Federal Court, the construction of the bond is matter of Federal law, and may raise a Federal question, for Error to a State Court.[13]

So, of questions of contract relation, or other like relation, between shipper or consignee, and carrier, as governed by Congressional Commerce legislation.[14]

5. So, (pursuant to general principles of Principal and Incident), of questions not inherently Federal questions, when, and in so far as underlying, and controlling of, Federal questions.[15]

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[7]Boyd v. Thayer, 143 U. S. 135; S 12:375; L 36:103; (Federal citizenship as a privilege, etc., although as a condition of State office). See, generally, Federal Citizenship.

[8]Feibelman v. Packard, 109 U. S. 421; S 3:289; L 27:984; Bachrack v. Norton, 132 U. S. 337; S 10:106; L 33:377; Bock v. Perkins, 139 U. S. 628; S 11:677; L 35:314.

[9]Howard v. United States, 184 U. S. 676; S 22:543; L 46:754.

[10]American Surety Co. v. Shultz, 237 U. S. 159; S 35:525; L 59:892.

[11]Ward v. Chamberlain, 2 Bl. 430; L 17:319; Crescent City Oil Co. v. Butchers' Union, 120 U. S. 141; S 7:472; L 30:614.

But not, where its Federal character is not involved. Provident Savgs. Soc'y v. Ford, 114 U. S. 635; S 5:1104; L 29:261.

[12]Factors' Ins. Co. v. Murphy, 111 U. S. 738; S 4:679; L 28:582.

[13]Meyers v. Block, 120 U. S. 206; S 7:525; L 30:642; Tullock v. Mulvane, 184 U. S. 497; S 22:372; L 46:657; Missouri, Ks. & Tex. Ry. v. Elliott, 184 U. S. 530; S 22:446; L 46:673.

[14]Southern Ry. v. Prescott, 240 U. S. 632; S 36:469; L 60:836 (question of status, duty, and liability of carrier as warehouseman at point of destination). But see § 683.

[15]E. g., the question of validity of a State confiscation, prior to the Constitution, as underlying the question of protective operation of the Treaty of 1783. (Smith v. Maryland, 6 Cr. 286; L 3:225); cases generally, such as are referred to in ¶ 1, supra.

So, (in a real action in a State Court) a question of general law of notice, as affecting title of the United States: Stanley v. Schwalby, 147 U. S. 508; 162 U. S. 255; S 16:754; L 40:960; (Error to a State Court). So of a Federal question underlying a question of

6. A Federal question may carry with it a closely-allied non-Federal question.[16]

7. Law not inherently within such texts may be brought within them by Congressional emphasis of it, by specific (although merely Declaratory) Adoption of it.[17]

8. The fact that a suit in a Federal Court is Ancillary[18] to an earlier or a pending Federal suit, constitutes Federal Question, and brings such later suit within the Federal Original Jurisdiction, as against State Jurisdiction.[19]

The principle extends to cross-bills.[20]

9. A suit by or against a corporation chartered by Act of Congress is, by virtue of the Congressional incorporation, a suit of Federal question, within the Constitutional text cited,[21] and, thereby, may be so treated by Congress for purposes of Federal Judicial Jurisdiction.[22]

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negligence under State law. Cornell Stmbt. Co. v. Phœnix Construction Co., 233 U. S. 593; S 34:701; L 58:1107.

See Contract; Property; Franchise.

[16]Thus, a suit may be a suit under the Patent laws, and so within the Federal Original Jurisdiction, although the plaintiff (relying upon infringement) pleads also a contract as controlling of the mode of ascertainment of damages. Healy v. Sea Gull Specialty Co., 237 U. S. 479; S 35:658; L 59:1056.

[17]Thus, an Act of Congress, dealing with sales of Indian lands, indirectly operated to adopt, as specific Federal Public policy, the general principles of law dealing with illegal and void contracts; and thereby converted, pro tanto, general law of the subject into law of Federal question. Sage v. Hampe, 235 U. S. 99; S 35: 94; L 59: 147.

[18]For definition of Ancillary suit see § 584, and cases cited immediately below.

[19]Simms v. Guthrie, 9 Cr. 19; L 31:642; Jones v. Andrews, 10 Wall. 327; L 19:935; Krippendorf v. Hyde, 110 U. S. 276; S 4:27; L 28:145; Dewey v. West Fairmont Gas Coal Co., 123 U. S. 329; S 8:148; L 31:179; Johnson v. Christian, 125 U. S. 642; S 8:989; L 31:820; In re Tyler, 149 U. S. 164, 181; S 13:785; L 37:689; Root v. Woolworth, 150 U. S. 401; S 14:136; L 37:1123; Julian v. Central Trust Co., 193 U. S. 93; S 24:399; L 48:629; Riverdale Mills v. Manufacturing Co., 198 U. S. 188; S 25:629; L 48:1008; Gunter v. Atlantic Coast Line, 200 U. S. 273; S 26:252; L 50:477; Kessler v. Eldred, 206 U. S. 285; S 27:611; L 51:1065.

[20]Rickey Land etc. Co. v. Miller & Lux, 218 U. S. 258; S 31:11; L 54:1032.

[21]Cases cited below.

Presumptively, such a suit is, in Congressional Judiciary legislation, so viewed and so treated.[23]

Congress has, however, either in particular Acts of incorporation,[24] or by general legislation,[25] eliminated Federal Question character to one or to another Federal Jurisdictional intent.

§ 683. Certain Specific Limitative Texts.[26]

Specific textual limitation of Federal Question character is made (a) in the field of Removal, in respect of suits (based upon certain Congressional legislation) against common carrier railroads;[27] and (b) in various fields of Federal Appellate Jurisdiction.[28]

§ 684. Principles Limitative of the Texts of General Character, above Considered.

1. To fall within the texts of general character, now

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[22]Osborn v. United States Bank, 9 Wh. 738; L 6:204; Bank of the United States v. Planters' Bank, 9 Wh. 904; L 6:244; Bank of Bethel v. Pahquioque Bank, 14 Wall. 383; L 20:840; Pacific R. R. Removal Cases, 115 U. S. 1; S 5:1113; L 29:319; Leather Mfrs. Bank v. Cooper, 120 U. S. 778; S 7:777; L 30:816.

[23]Pacific R. R. Removal Cases, cited above; Butler v. National Home, 144 U. S. 64; S 12:581; L 36:346; Northern Pac. R. R. v. Amato, 144 U. S. 465; S 12:740; L 36:506; Washington & Idaho R. R. v. Coeur D'Alene Ry., 160 U. S. 77; S 16:231; L 40:346; Bankers' Trust Co. v. Texas & Pac. Ry., 241 U. S. 295, 306; S 36:569; L 60:1010.

[24]Bank of the United States v. Deveaux, 5 Cr. 61; L 3:38; Osborn v. Bank of the United States, 9 Wh. 738; L 6:204, both cited in Bankers' Trust Co. v. Texas & Pac. Ry., (cited above), at pp. 303, 304.

[25]National Banks: see §§ 722, 846.

Federally-incorporated railroads:—

Act of Jan'y 28, 1915 (38 Stats. 804, § 5):—

> No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress.

This Act differs from the national bank text, referred to above, in that it does not give to railroad corporations, in question, (conventional) State citizenship for the purposes of Federal Jurisdiction by Diversity of Citizenship. Bankers' Trust Co. v. Texas & Pac. Ry., cited above.

[26]As to national banks and Congressionally incorporated railroads, see the preceding section, ¶ 9.

[27]§ 722, ¶ 2.

[28]Bankruptcy; Criminal laws; Revenue laws, etc., etc. (§§ 843-846).

under consideration, the question must be not merely in an academic sense, a Federal question, but must have color of merit: that is, must be worthy of serious consideration.[29]

2. To be within the contemplation of such texts, a question, even if inherently and generically of Federal character, must be an open question, not foreclosed by authoritative Federal decision.[30]

It is no answer to application of this principle, in a given instance, that the question of foreclosure or non-foreclosure is itself one of difficulty, determinable only by an elaborate course of reasoning.[31]

3. Such texts include only such Federal questions as are of proximate—not of mere remote—relation to the primary issues of the cause in hand.[32]

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[29]Franklin v. United States, 216 U. S. 559; S 30:434; L 54:615; Brolan v. United States, 236 U. S. 216; S 35:285; L 59:544; many other cases.

[30]Equitable L. Ass. Soc'y v. Brown, 187 U. S. 308; S 23:123; L 47:190; McGilvra v. Ross, 215 U. S. 70; S 30:27; L 54:95; Hannis Distilling Co. v. Baltimore, 216 U. S. 285; S 30:326; L 54:482; Easterling Lumber Co. v. Pierce, 235 U. S. 380; S 35:133; L 59:279; many other cases.

The Supreme Court, in its discretion, occasionally relaxes this requirement.

[31]McGilvra v. Ross, cited above: (Federal question held foreclosed); Adams v. Milwaukee, 228 U. S. 572; S 33:610; L 57:971. (Federal question held not foreclosed).

[32]Thus, in a suit in a State Court, by an assignee in Bankruptcy, to set aside a conveyance as fraudulent, upon principles of general law, the mere Federal status of the plaintiff was not a ground for Federal Error to the State Court (McKenna v. Simpson, 129 U. S. 506; S 9:365; L 32:771). So, of a Receiver (Bausman v. Dixon, 173 U. S. 113; S 19:316; L 43:633; Gableman v. Peoria etc. Ry., 179 U. S. 335; S 21:171; L 45:220). So, of status of a Federal railway postal clerk, plaintiff in a State Court, in a suit for damages, against a railroad corporation (Martin v. Pittsburg etc. R. R., 203 U. S. 284; S 27:100; L 51:184: Error to a State Court); of a question only remotely dealing with the proper interpretation of a Treaty (Sloan v. United States, 193 U. S. 614; S 24:570; L 48:814); and of mere alleged mis-interpretation by a State Court of a contract (Seattle etc. Ry. v. Linhoff, 231 U. S. 568; S 34:185; L 58:372: Impairment contention).

So, of the feature of acceptance of the Congressional Post Road and Telegraph Act of July 4, 1866, by a railroad as against which expropriation is brought under State law. Louisville & Nashv. R. R. v. Western Un. Tel. Co., 237 U. S. 300; S 35:598; L 59:965.

Where an Act of Congress made provision for sales of land by a

4. To fall within such texts, a question inherently a Federal question must be the dominant and controlling (not merely a subordinate) question.[33]

5. Mere derivation of title under, or other mere historical relation to, the Constitution, a Treaty, or other law of the United States, does not present a Federal question, in a controversy not otherwise within the texts in question.[34]

United States Marshal, the question (not specifically dealt with by the Act) of proper description of the land, in a particular sale, while in strictness a question of incidental Federal law, was not sufficiently proximate to be such for Federal Appellate Jurisdictional purposes, but was, for the purpose, to be considered a question of general law. Rogers v. Jones, 214 U. S. 196, 203, ad fin.; S 29:635; L 53:965.

See, also, Day v. Gallup, 2 Wall. 97; L 17:855; Buck v. Colbath, 3 Wall. 334; L 18:257; Grame v. Mutual Assurance Co., 112 U. S. 273; S 5:150; L 28:716; Etheridge v. Sperry, 139 U. S. 266; S 11:563; L 35:171.

As to Federal, or general, character of a Federal judgment, see the preceding section.

[33]Carey v. Houston & Tex. Centr. Ry., 150 U. S. 170; S 14:63; L 37:1041.

[34]McDonogh v. Millaudon, 3 How. 693; L 11:787 (conflicting claims under land title originally derived under a Treaty); Kennedy's Ex'ors v. Hunt's Lessee, 7 How. 586; L 12:829; Blackburn v. Portland Gold Min'g Co., 175 U. S. 571; S 20:222; L 44:276; Shoshone Min'g Co. v. Rutter, 177 U. S. 505; S 20:726; L 44:864; DeLamar's Min'g Co. v. Nesbit,, 177 U. S. 523; S 20:715; L 44:872; Beals v. Cone, 188 U. S. 184; S 23:275; L 47: 435 (conflicting claims under land title originally derived under an Act of Congress). So, of a fund of Federal origin (Conde v. York, 168 U. S. 642; S 18:234; L 42: 611).

So, Wilson v. Sandford, 10 How. 99; L 13:344; Brown v. Shannon, 20 How. 55; L 15:826; Hartell v. Tilghman, 99 U. S. 547; L 25:357; Albright v. Teas, 106 U. S. 613; S 1:550; L 27:295; Sargent v. Helton, 115 U. S. 348; S 6:78; L 29:412; Robinson v. Anderson, 121 U. S. 522; S 7:1011; L 30:1021; Dale Tile Co. v. Hyatt, 125 U. S. 46; S 8:756; L 31:683; Felix v. Scharnweber, 125 U. S. 54; S 8:759; L 31:687; Walter A. Wood Co. v. Skinner, 139 U. S. 293; S 11:528; L 35:193; Marsh v. Nichols, 140 U. S. 344; S 11:798; L 35:413; Wade v. Lawder, 165 U. S. 624; S 17:425; L 41:851; Pratt v. Paris Gas Light Co., 138 U. S. 255; S 18:62: L 42:458; Briggs v. United Shoe Mach'y Co., 239 U. S. 48; S 36:6; L 60:138 (conflicting claims of right or title under Federal Letters Patent); American Well Works v. Layne, 241 U. S. 257; S 36:585; L 60:987 (suit based upon threat of Patent suit).

6. As Congressional legislation now is, it is competent to a State, in a field not in and of itself within the texts in question, and not otherwise of direct Federal concern, and even in a field not of pure local character, (e.g., in the field of Commercial law), to maintain, and to enforce, in its own Courts, a view diverse from that of the Federal Judiciary; and, as a result, mere diversity of view as between the United States and a State, in such a field, is not matter of Federal Question, and is not within the texts in question.[35]

7. In the absence of action of Congress, Interpretation, by the Courts of a State, of Written law of another State, is not a matter of Federal Question.[36]

8. For the purposes of the Original Jurisdiction of a District Court, a Federal Question, to be operative for sustaining such Jurisdiction, must be a question arising upon, and as part of, the direct case of the party seeking the Federal Jurisdiction, and not a question borrowed (by anticipation of expected defence or other opposition) from his opponent.[37]

9. Questions of mere local concern, arising upon law of a Federal area, are not within the field of Federal Question.[38]

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[35]Winona etc. R. R. v. Plainview, 143 U. S. 371; S 12:530; L 36:191; Cable v. United States L. Ins. Co., 191 U. S. 288; S 24:74; L 48:188; Pennsylvania R. R. v. Hughes, 191 U. S. 477; S 24:132; L 48:268. See Following of State Decisions (§§ 638-697).

[36]Johnson v. New York L. Ins. Co., 187 U. S. 491; S 23:194; L 47:273; Allen v. Allegheny Co., 196 U. S. 458; S 25:311; L 49:551.

[37]Boston etc. Mining Co. v. Montana Ore Co., 188 U. S. 632; S 23:434; L 47:626; Filhiol v. Torney, 194 U. S. 356; S 24:698; L 48:1014; Louisville & Nashv. R. R. v. Mottley, 211 U. S. 149; S 29:42; L 53:126; Moyer v. Peabody, 212 U. S. 78; S 29:235; L 53:410; In re Winn, 213 U. S. 458; S 29:515; L 53:873. See §§ 753 et seq.

[38]American Security Co. v. District of Columbia, 224 U. S. 491; S 32:553; L 56:856; Washington etc. Ry. v. Downey, 236 U. S. 190; S 35:406; L 59:533.

See § 682, par. 2.

CHAPTER CXXIV.

Federal Jurisdictional Amount.

§ 685. Principles of General Character, (Applicable to Federal Original, or to Federal Appellate, Jurisdiction, Alike).

1. The provisions in respect of jurisdictional amount are strictly limitative, and are in no sense expansive, of jurisdiction.[1]

2. It is, as matter of definition, essential to compliance with such requirement, that a matter in controversy be capable of pecuniary valuation.[2]

Political and social rights are capable of pecuniary valuation.[3]

A claim not as yet matured, (if, by the pertinent Procedure law, capable of suit), is capable of valuation for the purposes now in question, and may be of jurisdictional amount, if the present value, as of the material time, is of that amount.[4]

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[1]Thus, where, in Equity, the general rules of Procedure do not admit of the joining of two parties, the fact that joinder is necessary to make up jurisdictional amount, does not operate to permit the joinder. Walter v. Northeastern R. R., 147 U. S. 370; S 13:348; L 37:206. So, Northern Pac. R. R. v. Walker, 148 U. S. 391; S 13:650; L 37:494; Fishback v. Western Un. Tel. Co., 161 U. S. 96; S 16:506; L 4:630.

[2]Barry v. Mercein, 5 How. 103; L 12:70; Pratt v. Fitzhugh, 1 Bl. 271; L 17:206; Whitney v. Dick, 202 U. S. 132; S 26:584; L 50:963; (habeas corpus).

Durham v. Seymour, 161 U. S. 235; S 16:452; L 40:682; (matter in issue, a claim of intervention in pending Patent Office proceeding).

Caffrey v. Oklahoma, 177 U. S. 346; S 20:664; L 44:799; absence of possible pecuniary valuation, in the case of Mandamus to an official having no personal interest in the (tax) question in controversy.

Albright v. Sandoval, 200 U. S. 9; S 26:210; L 50:346; (matter in controversy simply alleged as usurpation of office).

[3]Lee v. Lee, 8 Pet. 44; L 8:860; (status as slave or free; see p. 48); Wiley v. Sinkler, 179 U. S. 58; S 21:17; L 45:84; Swafford v. Templeton, 185 U. S. 487; S 22:783; L 46:1005; Giles v. Harris, 189 U. S. 475; S 23:639; L 47:909.

[4]Schunk v. Moline Co., 147 U. S. 500; S 13:416; L 37:255. In this case the present value, at the time of beginning suit, was evidently above the required jurisdictional amount.

3. In respect of the question of potential pecuniary valuation, and in respect of processes of valuation, the Federal Law adopts and follows general Common Law principles of Value.[5]

4. In the matter of a judgment, as subject of suit, there is no Federal distinction adverse to alimony judgments, as such, as between them and other judgments.[6]

5. Potential exemplary damages, where allowable, may be pleaded, and counted in, to make jurisdictional amount.[7]

6. Interest stands, mutatis mutandis, upon the same footing as principal.[8] A different situation may be presented where a contract for interest is distinct from the contract for principal: as, in the case of coupons, payable to bearer.[9]

7. Where, or in so far as, the question of jurisdictional amount is a question of fact, it may, in the District Courts, be passed upon, in the discretion of the Court, by the Court,[10] or, in a jury cause, be submitted to the jury.[11]

In an Appellate Court, it is, of necessity, passed upon by the Court.[12]

In either class of Court, it may be inquired into dehors the record.[13]

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[5]Thus, an expectancy of continuance of life is capable of valuation, in case of annuity, life-tenancy, alimony, and the like. Thompson v. Thompson, 226 U. S. 551; S 33:129; L 57:347; (alimony).

See, generally, Value.

[6]Thompson v. Thompson, cited above; Simms v. Simms, 175 U. S. 162; S 20:58; L 44:115 (a case of suit upon a judgment for a single fixed sum, of jurisdictional amount for the suit upon it).

[7]Barry v. Edmunds, 116 U. S. 550; S 6:501; L 29:729. See also Vance v. Vandercook Co., (No. 2), 170 U. S. 468; S 18:645; L 42:1111.

[8]Bank of the United States v. Daniel, 12 Pet. 32; L 9:989; The Patapsco, 12 Wall. 451; L 20:457; New York Elev. R. R. v. Fifth Bank, 118 U. S. 608; S 7:23; L 30:259.

[9]Edwards v. Bates County, 163 U. S. 269; S 16:967; L 41:155.

[10]Wetmore v. Rymer, 169 U. S. 115; S 18:293; L 42:682.

[11]Jones v. League, 18 How. 76; L 15:263; Chicago & Northw. Ry. v. Ohle, 117 U. S. 123; S 6:632; L 29:837; both cited with approval, in Wetmore v. Rymer, (cited above), at pp. 120, 121.

[12]As in Thorp v. Bonnifield, 177 U. S. 15; S 20:533; L 44:652.

[13]Cases cited above; Wilson v. Blair, 119 U. S. 387; S 7:230; L 30:441.

8. In the absence of specific Congressional provision upon the matter, the requirements of jurisdictional amount do not apply to a Federal suit ancillary to a Federal suit.[14]

9. Where separate claims have a common basis, and are necessarily (as matter of procedure) presented jointly, and the judgment will be (or is) joint, as to the common basis, although distributive as to particular amounts, it is sufficient that the common basis in controversy (and the aggregate of the separate claims) be of the jurisdictional amount.[15]

Mere optional joinder, however, of a number of claimants, in a single suit, as matter of Equitable privilege,[16] does not have this effect; but the several claims are viewed severally, from the standpoint of jurisdictional amount.[17]

10. In the case of a suit by or against a purely representative party,[18] suing or sued in respect either of a fund or of some other subject-matter, the value of the whole fund or other subject-matter (in so far as in controversy) is the amount in controversy, regardless, in a given instance, of the fact that such sum, fund, or matter will, upon judgment in such party's favor, be distributable to and among (or will otherwise be distributively available to) differ-

[14]White v. Ewing, 159 U. S. 36; S 15:1018; L 40:67: the matter of jurisdiction of the ancillary suit being, in accordance with the general Common Law conception of ancillary suit (q. v.) governed by that of the principal suit.

[15]Marshall v. Holmes, 141 U. S. 589; S 12:62; L 35:870; New Orleans Pac. Ry. v. Parker, 143 U. S. 42; S 12:364; L 36:66; (mortgage foreclosure suit by all bondholders); McDaniel v. Traylor, 196 U. S. 415; S 25:369; L 49:533; (hill in Equity to remove a cloud, in the form of separate, closely related, liens); Troy Bank v. Whitehead & Co., 222 U. S. 39; S 32:9; L 56:81; (suit to enforce an indivisible vendor's lien, securing a number of purchase-money notes, endorsed to and held by the plaintiffs severally).

[16]E. g., for avoidance of Multiplicity of Actions.

[17]Russell v. Stansell, 105 U. S. 303; L 26:989; Gibson v. Shufeldt, 122 U. S. 27; L 30:1248; Ogden City v. Armstrong, 168 U. S. 224; S 18:98; L 42:444; Wheless v. St. Louis, 180 U. S. 379; S 21:402; L 45:583; Rogers v. Hennepin County, 239 U. S. 621; S 36:217; L 60:469; (suits to enjoin against general taxes or special assessments); Pinel v. Pinel, 240 U. S. 594; S 36:416; L 60:817 (suit by children of a testator, each claiming as to himself, statutory intestacy).

[18]As, an Executor, Administrator, Trustee, Guardians, Public Officials, or the like.

ent beneficiaries, in amounts severally below the jurisdictional amount in question.[19]

11. Where a controversy deals with a fund, or other property res, but involves only some title or interest less than full title, the value of the entire res is immaterial, and it is only the such lesser title or interest that is the amount in controversy.[20]

12. The fact that a judgment in a case primarily in question will, as matter of Judicial Precedent, be controlling of like issues of law in other existing controversies, is immaterial.[21]

13. Mere possible, or natural, operation, by way of res judicata, in another (pending or possible) suit, which would possess jurisdictional amount, is not sufficient, in and of itself, to give jurisdictional amount to a claim (or to a judgment) primarily in question.[22]

14. Where, however, as matter of pure Procedure law, a certain controversy in pais between two persons, is capable of being presented for Judicial determination only in a fragmentary way—by suit over some separable fragment of it, and the fragment is not itself of a certain required jurisdictional amount; and if a judgment in such fragmentary suit would, through the doctrine of res judicata,

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[19](a) Representative Plaintiff.

Texas & Pac. Ry. v. Gentry, 163 U. S. 353; S 16:1104; L 41:186; (statutory death-claim suit).

(b) Representative Defendant.

Illinois Centr. R. R. v. Adams, 180 U. S. 28; S 21:251; L 45:410; (suit against a State tax collector, to enjoin collection of a tax ultimately distributable among minor tax-areas); Davies v. Corbin, 112 U. S. 36; S 5:4; L 28:627; (a like situation, except in the feature of ultimate distributability among private persons as tax-beneficiaries). So, in effect, Shields v. Thomas, 17 How. 3; L 15:93; McDaniel v. Traylor, 196 U. S. 415; S 25:369; L 49:533.

[20]McClung v. Penny, 189 U. S. 143; S 23:589; L 47:751. So, Farmers' Bank v. Hooff, 7 Pet. 168; L 8:646; Ross v. Prentiss, 3 How. 771; L 11:824.

[21]If this were not so, almost any cause involving a question of law, would be of jurisdictional amount.

[22]Elgin v. Marshall, 106 U. S. 578; S 1:484; L 27:249: (see explanation, p. 581, of the reasonableness of the principle); New Jersey Zinc Co. v. Trotter, 108 U. S. 564; S 2:875; L 27:828; Clay Center v. Farmers' Loan etc. Co., 145 U. S. 224; S 12:817; L 36:685.

be practically decisive of the whole original controversy; then, and in such case, the fragment sued upon draws to itself the value of the whole controversy, for the purpose of jurisdictional amount.[23]

15. In general, mere indirect results of a suit are not to be considered as in controversy in such suit, for the purpose of jurisdictional amount.[24]

16. Where a suitor invokes Federal Jurisdiction upon a contention in alternative form, it is sufficient that upon one of the alternatives the controversy is of Federal jurisdictional amount. Thus, a claim, on Appeal, by Appellants, (plaintiffs below), in the alternative, for either (a) land of value less than the Appellate jurisdictional amount, or (b) reimbursement of a sum of Appellate jurisdictional amount, is as a whole, of such jurisdictional amount.[25]

17. If the United States is an actual, (not a mere nominal), party, amount is immaterial.[26]

18. It is hardly necessary to say that in the field in question as in general, consistency is to be observed.[27]

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[23]Berryman v. Whitman College, 222 U. S. 334; S 32:147; L 56: 225. (Suit seeking injunction against the enforcement of a certain tax of a certain year, but upon grounds applicable to a succeeding term of years. Held, that the value of the exemption as a whole was the amount in controversy).

So, of a suit for injunction against removal of telephone poles and wires, where the value of the franchise and business, (not the value of the poles and wires), was the real amount in controversy. Glenwood Light Co. v. Mutual Light Co., 239 U. S. 121; S 36:30; L 60: 174.

See McNeil v. Southern Ry., 202 U. S. 543; S 26:722; L 50:1142.

[24]Thus, in habeas corpus for release of a defendant from imprisonment in a Civil suit, the amount involved in the Civil suit is not to be considered upon the question of amount for the habeas corpus proceeding. Pratt v. Fitzhugh, (cited above, under par. 2 of this section). See also the preceding paragraphs, and cases cited.

[25]Shappirio v. Goldberg, 192 U. S. 232; S 24:259; L 48:419.

For a case in which one alternative—of lower amount—disappeared in the Court below, leaving only an averment of Appellate amount, see Bennett v. Butterworth, 8 How. 124; L 12:1013.

[26]United States v. Sayward, 160 U. S. 493; S 16:371; L 40:508; United States Fidelity etc. Co. v. Kenyon, 204 U. S. 349; S 27: 381; L 51:516; (suit on material-men's etc. bond).

[27]One had a cause of action, in tort or in contract, at his election. He was entitled, as the facts were, to the Federal Jurisdiction, if he sued in tort; but the amount was not sufficient for that Jurisdiction

19. The general principle of Interpretation, of presumptive absence of intent of operation (of a new statute) upon pending suits, is operative in respect of jurisdictional amount.[28]

20. The question of amount, as determinable by a pleading, is of course, determinable according to general principles of pleading.[29]

§ 686. Principles Pertinent only to Appellate Jurisdiction.

1. If, after judgment below, one or the other party desires to prosecute Appeal or Error, (as the case may be), an entirely new question arises: namely, the amount of the controversy presented by the proposed Appeal or Error; and the amount of that new proposed controversy must be of the required Appellate jurisdictional amount, without regard to the amount in controversy below at any stage prior to judgment.[30]

2. A judgment upon counter-claim, viewed by itself, and apart from the judgment upon the claim of the plaintiff

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if he sued in contract; while, on the other hand, contract (if the amount had been sufficient) would survive; tort, not. Action having been brought in a District Court, in tort, and the defendant having deceased, pendente lite, the action was not capable of being viewed as in tort for avoidance of the amount requirement, and in contract to effect survival. Iron Gate Bank v. Brady, 184 U. S. 665; S 22: 529; L 46: 739.

[28]Springstead v. Crawfordsville Bank, 231 U. S. 541; S 34: 195; L 58: 354 (increase of jurisdictional amount not a bar to Amendment, otherwise permissible, in a pending cause, to show jurisdictional amount as prescribed by pre-existing Congressional legislation).

[29]E. g., not by an averment which is a mere conclusion of law. Bowman v. Chicago & Northw. Ry., 115 U. S. 611; S 6: 192; L 29: 502.

[30]Thus, if the plaintiff below recovers judgment for less than the amount of his claim below, and proposes Appeal or Error, the controversy proposed to be so presented is a controversy merely over the difference between his full claim and the amount of the judgment that he has recovered; and such difference must be itself of the required Appellate jurisdictional amount, without regard to the amount of his original claim below. Gordon v. Ogden, 3 Pet. 33; L 7: 592; Gray v. Blanchard, 97 U. S. 564; L 24: 1108; Tintsman v. National Bank, 100 U. S. 6; L 25: 530; Hilton v. Dickinson, 108 U. S. 165; S 2: 424; L 27: 688, (reviewing, pp. 168-175, certain earlier cases, and treating certain of them as overruled); Jenness v. Citizens' Bank, 110 U. S. 52; S 3: 425; L 28: 67.

below, rests upon the principles stated above, for the purposes of Appellate jurisdictional amount.[31]

3. It may evidently be necessary, in case of counter-claim, (and of two judgments, one for or against the plaintiff below, and one for or against the defendant below), to deal with the two judgments in their relation to each other, for application of the principle immediately above stated.[32]

4. Where there are, in a single suit, separate judgments for different plaintiffs or different defendants, and where, as matter of Procedure, Appeals or Writs of Error are required to be separate; then, and in such case, any particular such judgment must, for Appeal or Error concerning it, be of the required Appellate jurisdictional amount.[33]

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[31]Thus, a defendant pleading, below, a counter-claim of Appellate jurisdictional amount, and defeated below, is entitled (as matter of Appellate jurisdictional amount) to Appeal or Error (as the case may be), although the claim of the plaintiff below was below that amount. Ryan v. Bindley, 1 Wall. 66; L 17:559; Dushane v. Benedict, 120 U. S. 630; S 7:696; L 30:810; Block v. Darling, 140 U. S. 234; S 11:832; L 35:476; Buckstaff v. Russell, 151 U. S. 626; S 14:448; L 38:292; Harten v. Löffler, 212 U. S. 397; S 29:351; L 53:568.

[32]Thus, where there is judgment below for the plaintiff, both on his own claim and upon the defendant's counter-claim, the aggregate amount of (a) the plaintiff's (affirmative) judgment and (b) the (defeated) claim in set-off, is the amount of the grievance of the defendant below; and the both amounts may be combined to make Appellate jurisdictional amount in his favor. Buckstaff v. Russell, (cited above), at p. 628: "That sum and" * * *.

Where (the plaintiff, not appealing) the defendant appeals both from the affirmative judgment against him and also from the disallowance of a counter-claim presented by him below, it is the aggregate of such affirmative judgment and of the amount of the counter-claim that constitutes the amount in controversy. Export Lumber Co. v. Port Banga Co., 237 U. S. 388; S 35:604; L 59:1009.

[33]Terry v. Hatch, 93 U. S. 44; L 23:796; Fourth Bank v. Stout, 113 U. S. 684; S 5:695; L 28:1152; Gibson v. Shufeldt, 122 U. S. 27; S 7:1066; L 30:1083; Wheeler v. Cloyd, 134 U. S. 537; S 10:601; L 33:1008; Henderson v. Carbondale Coal etc. Co., 140 U. S. 25; S 11:691; L 35:332; Morgan v. Adams, 211 U. S. 627; S 29:213; L 53:362; McDaniel v. Traylor, 212 U. S. 428; S 29:343; L 53:584; Tupino v. Compania de Tabacos, 214 U. S. 268; S 29:610; L 53:992.

Other cases are: Ex parte Baltimore & O. R. R., 106 U. S. 5; S 1:35; L 27:78; Farmers' Loan & Trust Co. v. Waterman, 106 U. S. 265; S 1:131; L 27:115; Hassall v. Wilcox, 115 U. S. 598; S 6:189; L 29:504.

§ 687. Power of a Lower Federal Court (or of Parties therein) over the Amount in Controversy, With a View to Appellate Jurisdictional Amount.

1. Within the scope of its general powers in respect of Amendment, a lower Federal Court may, in its discretion, at any stage prior to the attaching of Appellate Jurisdiction, allow an amendment reducing a claim in controversy (if in its nature capable of such reduction) to an amount below an Appellate jurisdictional amount,—with the view, and with the result, of defeating Appeal or Error.[34]

2. The same result can, a fortiori, be brought about, by action of the parties (or of one party, acquiesced in by the other party), so reducing the amount involved.[35]

3. A claimant party (or a prevailing party) cannot, of his own motion,—without action of the Court, or acquiescence of the opposing party—make a reduction, by remittitur or otherwise, to such end, and with such effect.[36]

4. The debtor party (or defeated party) cannot, of his own motion, increase the amount of the claim or of the judgment against him, to create for himself an Appellate jurisdictional amount.[37]

5. Nor, it would seem, can the Court allow Amendment or admission, to such end.[38]

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[34]Opelika City v. Daniel, 109 U. S. 108; S 3:70; L 27:873 (amendment before verdict); Alabama Gold L. Ins. Co. v. Nichols, 109 U. S. 232; S 3:120; L 27:915; First Bank v. Redick, 110 U. S. 224; S 3:640; L 28:124: (cases of remittitur, after verdict and before judgment).

[35]Thompson v. Butler, 95 U. S. 694; L 24:540; Thorp v. Bonnifield, 177 U. S. 15; S 20:533; L 44:652.

It is not essential to this result that the satisfaction or diminution of the judgment appear of record, in the Court of the judgment; it may be shown dehors the record, in the Appellate Court. Thorp v. Bonnifield, cited above.

[36]New York Elev. R. R. v. Fifth Bank, 118 U. S. 608; S 7:23; L 30:259.

[37]Northern Pac. R. R. v. Booth, 152 U. S. 671; S 14:693; L 38:591.

[38]Case last cited, at p. 672. We introduce into the text the qualification: "it would seem", for the reason that the action in question, (of the Court and of the defeated party), was, apparently, ex parte.

This conclusion appears to follow also from the principle of the next succeeding paragraph.

6. Nor can there be such enlargement, for such purpose, and to such end, by consent.[39]

7. Consolidation, by a lower Court, (within the general scope of its powers as to consolidation), of a number of suits between the same parties, may so operate as to combine the several amounts originally involved, and to create a single amount of the required Appellate jurisdictional amount.[40]

8. A party cannot, pendente lite, by his voluntary action in pais, create Appellate jurisdictional amount, by creating, or by increasing, a liability on his part, to third persons.[41]

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[39]Webster v. Buffalo Ins. Co., 110 U. S. 386; S 4:79; L 28:172.

[40]Baltimore & O. Southw. R. R. v. United States, 220 U. S. 94; S 31:368; L 55:384. Aliter of the mere trying of different cases together, even where the parties are the same. Martinez v. International Banking Corp'n, 220 U. S. 214; S 31:408; L 55:438.

[41]Wallach v. Rudolph, 217 U. S. 561; S 30:587; L 54:883; (where, pending Eminent Domain proceedings in respect of a tract of land, the owner sold certain portions of the tract to different persons, binding himself to make good any special assessments upon such parcels). See, also, New England Mortg. Co. v. Gay, 145 U. S. 123; S 12:815; L 36:646.

CHAPTER CXXV.

THE QUESTION OF FOLLOWING, OR NOT, IN THE FEDERAL COURTS, OF STATE DECISIONS UPON STATE LAW.—ANALOGY AS TO FEDERAL STATES.

§ 688. Prefatory:—Two Generically Different Classes of Decisions.

A State Judicial decision (a) adjudicative of law of the State; (b) not involving a Federal question; and (c) operative and binding—from the Federal and from the State point of view—as Judicial Precedent in and upon the Courts of the State, may, or may not, be thus operative and binding in and upon the Federal Courts, Original or Appellate. Such State decisions are divided, in the Federal view, into two classes, according as they deal (a) with (State) law of local, or (b) with (State) law of general, concern.

The Federal independence of view and of decision in the latter case, may result, and in a material degree has resulted, in two conflicting lines of Precedent and of decision, (Federal and State), upon certain features or points of the law of a particular State; with the practical result of application, in many instances, of one or the other view, according to what may be an accident of jurisdiction (as, of domicil of some one party), or of mere option on a plaintiff's part, in his initial pleading.[1]

This does not mean—where, and in so far as, the Federal and the State law differ—either (a) that there are two conflicting bodies of State Unwritten law; or (b) that the Federal view is Federal law as distinguished from State law. It means simply, that, pro tanto, there exist at present, in and for each State, two mutually independent Judicial systems, with no common Appellate Court to enforce harmony.

From the standpoint of American conceptions, and of the existence, in practice, in each of our States, of a general Appellate Court of last resort, this duplex system is

[1] § 756.

an anomaly. In England, however, at least down to a very recent period, there was no such general Appellate Court, open as of right to suitors; and conflicting views were actually applied, without remedy therefor. So, in our States, there is, in many instances, an Appellate Amount requirement, which, in certain classes of cases, may result in the application, as among different Courts of a State, or as among different Judges, of conflicting views of State law.[2]

§ 689. State Decisions As, or As Not, Made in the Federal Proceeding in Question.—State Decision in Another Cause, Pending the Federal Proceeding.

For the purpose now in question, it is, in general, immaterial whether a State decision in question is (a) one made in a State proceeding in question,[3] or (b) one made in some other cause; (as is, of course, regularly the case, in a Federal Court of Original Jurisdiction); and, if made in another cause, whether it antedates the Federal cause or proceeding primarily in question;[4] or be made pending the Federal proceeding.[5]

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[2]The considerations: (a) that in Equity, in the District Courts, the Federal Judiciary, in general, follows an independent course, regardless of State view; and (b) that at Common Law, in the District Courts, the Federal Judiciary, to a large extent, follows the same course, perhaps involve the conclusion that (apart from law of strictly local character and import, such as local land law) it is competent to Congress materially to modify, or to annul, the rule presented in the present paragraph of our text, for uniformity throughout the realm, or throughout the States, in fields of general law of general concern, and for remedy of the practical injustice now actual or potential.

[3]E. g., in a State judgment to which Federal Error is pending.

[4]The cases cited below are distinguished as having (a) arisen in the Federal Original Jurisdiction, or (b) come up by Error to a State Court.

Baltimore Traction Co. v. Baltimore Belt R. R., 151 U. S. 137; S 14:294; L 38:102; Osborne v. Florida, 164 U. S. 650; S 17:214; L 41:586; Carstairs v. Cochran, 193 U. S. 10; S 24:318; L 48:596; (E to St. Ct.); San Francisco Bank v. Dodge, 197 U. S. 70; S 25:384; L 49:669; (F. Orig. Jur.): (the Unwritten law of the State, as of the period in question, being shown by an agreed statement); National Cotton Oil Co. v. Texas, 197 U. S. 115; S 25:379; L 49:689; (E. to St. Ct.); Northwestern L. Ins. Co. v. Riggs, 203 U. S. 243; S 27:126; L 51:168 (F. Orig. Jur.); Mississippi R. R. Comm. v. Illinois Centr. R. R., 203 U. S.

This practice is, however, departed from in exceptional instances.[6]

§ 690. Illustration:—(a) Law Strictly or Predominantly of Mere Local Concern.[7]

Illustration of the class of State decisions Federally accepted and followed as binding Judicial Precedent, may be presented as follows:—[7]

1]* Decisions Interpretative of the State Constitution, and upon Constitutionality (from the standpoint of the State Constitution) of a statute of the State;[8]

2] Decisions, in general, Interpretative of State Written law;[9]

335; S 27:90; L 51:209; (F. Orig. Jur.); Bacon v. Walker, 204 U. S. 311; S 27:289; L 51:499; (E. to St. Ct.); Ughbanks v. Armstrong, 208 U. S. 481; S 28:372; L 52:582; (E. to St. Ct.); Welch v. Swasey, 214 U. S. 91; S 29:567; L 53:923; (E. to St. Ct.); Hannis Distilling Co. v. Baltimore, 216 U. S. 285; S 30:326; L 54:482; (F. Orig. Jur.)

[5]Green v. Neal's Lessee, 6 Pet. 291; L 8:402; (F. Orig. Jur.); Moores v. National Bank, 104 U. S. 625; L 26:870; (F. Orig. Jur.); Bauserman v. Blunt, 147 U. S. 647; S 13:466; L 37:316 (F. Orig. Jur.); Northwestern L. Ins. Co. v. Riggs, 203 U. S. 243; S 27:126; L 51:168; (F. Orig. Jur.); Gulf, Colorado & S. F. Ry. v. Dennis, 224 U. S. 503; S 32:542; L 56:860; (E. to St. Ct.); Messenger v. Anderson, 225 U. S. 436; S 32:739; L 56:1152 (F. Orig. Jur.).

[6]Burgess v. Seligman, 107 U. S. 20; S 2:10; L 27:359; (F. Orig. Jur.); Kuhn v. Fairmont Coal Co., 215 U. S. 349; S 30:140; L 54:228; (F. Orig. Jur.); (three Justices dissenting).

[7]Out of a great number of cases, only a limited number—typical, and sufficient for illustration—are cited.

*Dark-faced numerals are inserted merely for convenience of reference.

[8]Western Un. Tel. Co. v. Gottlieb, 190 U. S. 412; S 23:730; L 47:1116; Peters v. Broward, 222 U. S. 483; S 32:122; L 56:278; Missouri, Ks. & Tex. Ry. v. Cade, 233 U. S. 642; S 34:678; L 58:1135.

[9]Davie v. Briggs, 97 U. S. 628; L 24:1086; In re Lockwood, 154 U. S. 116; S 14:1082; L 38:929; Noble v. Mitchell, 164 U. S. 367; S 17:110; L 41:472; Rothschild v. Knight, 184 U. S. 334; S 22:391; L 46:573; Palmer v. Texas, 212 U. S. 118; S 29:230; L 53:435; Boston Chamber of Commerce v. Boston, 217 U. S. 189; S 30:459; L 54:725; Wadley Southern Ry. v. Georgia, 235 U. S. 651; S 35:214; L 59:405; Yost v. Dallas County, 236 U. S. 50; S 35:235; L 59:460.

3] Decisions in respect of enactment, and the like, of a State statute;[10]

4] Decisions definitory of the attitude of the State, (or of the character, as public or private, in which it is acting);[11]

5] Decisions upon the internal organization of the State;[12]

6] Decisions upon the powers of the respective State Courts;[13]

7] Decisions upon State Judicial Procedure;[14]

8] Decisions upon peculiarly local aspects or features of land-title in the State, embodying settled rules of property;[15]

9] State decisions in respect of validity of so-called "spendthrift trusts";[16]

10] A State decision of interpretation of a particular will, as between legatees and the United States;[17]

11] A State decision as to whether a voluntary assignment for creditors may embody a requirement of release, from creditors availing themselves of the assignment;[18]

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[10]South Ottawa v. Perkins, 94 U. S. 260; L 24:154; Peters v. Broward, cited above.

[11]§ 152 and cas. cit.

[12]Norton v. Shelby County, 118 U. S. 425; S 6:1121; L 30:178; Forsyth v. Hammond, 166 U. S. 506; S 17:665; L 41:1095; Michigan Centr. R. R. v. Powers, 201 U. S. 245; S 26:459; L 50:744; Preston v. Chicago, 226 U. S. 447; S 33:177; L 57:293.

[13]Chicago, Milw. & St. Paul Ry. v. Minnesota, 134 U. S. 418; S 10:462; L 33:970; Taylor v. Beckham (No. 1), 178 U. S. 548; S 20:890; L 44:1187.

[14]Security Trust Co. v. Dodd, Mead & Co., 173 U. S. 624; S 19:545; L 43:835; Yazoo & Miss. R. R. v. Brewer, 231 U. S. 245; S 34:90; L 58:204.

[15]Nichols v. Levy, 5 Wall. 433; L 18:596; Yates v. Milwaukee, 10 Wall. 497; L 19:984; Pickett v. Foster, 149 U. S. 505; S 13:998; L 37:829; Warburton v. White, 176 U. S. 484; S 20:404; L 44:555; Buchser v. Buchser, 231 U. S. 157; S 34:46; L 58:166.

[16]Eaton v. Boston Trust Co., 240 U. S. 427; S 36:391; L 60:723. See Nichols v. Eaton, 91 U. S. 716; L 23:254; Shelton v. King, 229 U. S. 90; S 33:686; L 57:1086.

[17]Uterhart v. United States, 240 U. S. 598; S 36:417; L 60:819; (operation of Federal tax law, as fixed by State Judicial decision as to particular property).

[18]Robinson & Co. v. Belt, 187 U. S. 41; S 23:16; L 47:65.

12] A State decision in respect of essentials of valid statutory or Common Law marriage within the State;[19]

13] A State decision interpretative of a State Statute of Limitations of the State.[20]

§ 691. Illustration:—(b) Law Not Strictly or Predominantly of Local Concern.

Illustration of the class of State decisions not Federally accepted and followed as binding Judicial Precedent may be presented as follows:—[21]

1]* Decisions upon land-title, based upon general, not peculiarly local, principles;[22]

2] Decisions upon the Common Law of Torts, in general;[23]

3] of Libel (from the Civil standpoint);[24]

4] of Common Carriers;[25]

5] of commercial contract, in general;[26]

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[19]Meister v. Moore, 96 U. S. 76; L 24: 826; Travers v. Reinhardt, 205 U. S. 423; S 27: 563; L 51: 865.

[20]Dibble v. Bellingham Bay Co., 163 U. S. 63; S 16: 939; L 41: 72.

[21]Out of a vast number of cases, it is necessary to cite only a very limited number of typical decisions.

*Dark-faced numerals are inserted merely for convenience of reference.

[22]Foxcroft v. Mallett, 4 How. 353; L 11: 1008; (interpretation of a deed of land, by general Common Law principles).

So, of interpretation of a will, devising land within the State. Lane v. Vick, 3 How. 464; L 11: 681.

So, of broad general Common Law principles of land-title and its incidents. Kuhn v. Fairmont Coal Co., 215 U. S. 349; S 30: 140; L 54: 228.

[23]Northern Pac. R. R. v. Hambly, 154 U. S. 349; S 14: 983; L 38: 1009, even where liability of a State municipal corporation, in respect of its streets, is in question. Chicago v. Robbins, 2 Bl. 418; L 17: 298.

[24]Peck v. Tribune Co., 214 U. S. 185; S 29: 554; L 53: 960.

[25]Hart v. Pennsylvania R. R., 112 U. S. 331; S 5: 151; L 28: 717; St. Louis, Iron Mtn. etc. Ry. v. Paul, 173 U. S. 404; S 19: 419; L 43: 746; Pennsylvania R. R. v. Hughes, 191 U. S. 477; S 24: 132; L 48: 268.

[26]Swift v. Tyson, 16 Pet. 1; L 10: 865; Hanover Bank v. Suddath, 215 U. S. 110; S 30: 58; L 54: 115; (a case of construction of a printed collateral security agreement between a bank and a customer); many later cases.

6] of void or voidable such contract;[27]

7] of commercial paper, including public bonds or notes, (negotiable in form), issued under State authority;[28]

8] of Estoppel.[29]

§ 692. Change in the Course of State Decision.

In a situation in which State decision is controlling, in a Federal Court, the latest State decision is, in general, followed, where there has been a change in the course of State decision:[30] with corresponding departure from an earlier Federal decision based upon earlier State decisions.[31]

§ 693. Awaiting a State Decision.

In exceptional situations, the Federal Judiciary, (in Original, or in Appellate, Jurisdiction), goes to the extent of awaiting a State decision;[32] or even dismisses the Federal suit, without prejudice, to await determination of a question of State law by the State Courts.[33]

§ 694. Different Interpretations, in Different States, of Like State Written Texts.

It not infrequently occurs that a number of different States have different Written texts of like tenor, requiring, as matter of reasoning, a uniform interpretation; but that the interpretation is different in different such States. In

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[27]Board of Trade v. Christie Grain etc. Co., 198 U. S. 236; S 25: 637; L 49; 1031.

[28]Pine Grove v. Talcott, 19 Wall. 666; L 22:227; Cromwell v. County of Sac, 96 U. S. 51; L 24:681; Pana v. Bowler, 107 U. S. 529; S 2:704; L 27:424; Ackley School District v. Hall, 113 U. S. 135; S 5:371; L 28:954; New Providence v. Halsey, 117 U. S. 336; S 6:764; L 29:904.

[29]McCarty v. Roots, 21 How. 432; L 16:162; (a Common Law question of Estoppel by judgment).

[30]Green v. Neal's Lessee, 6 Pet. 291; L 8:402; Suydam v. Williamson, 24 How. 427; L 16:742; Moores v. National Bank, 104 U. S 625; L 26:870; Bauserman v. Blunt, 147 U. S. 647; S 13: 466; L 37:316; Hartford Ins. Co. v. Chicago, Milw. & St. Paul Ry., 175 U. S. 91; S 20:33; L 44:84; Gulf, Colorado & S. F. Ry. v. Dennis, 224 U. S. 503; S 32:542; L 56:860; Messenger v. Anderson, 225 U. S. 436; S 32:739; L 56:1152.

[31]Cases above cited.

[32]Bank of Hamilton v. Dudley's Lessee, 2 Pet. 492; L 7:496; (see p. 520; "As it was" * * *); Hartford Ins. Co. v. Chicago, Milw. & St. Paul Ry., 175 U. S. 91, 95; S 20:33; L 44:84.

[33]Otis Co. v. Ludlow Mfg. Co., 201 U. S. 140; S 26:353; L 50:696.

such situation, the Federal Judiciary accepts, as State Unwritten law, the interpretation of each State, for the purpose of the law of such State; with the result (where State decisions are, upon general Federal principles, to be followed by the Federal Judiciary), of a corresponding variation of Federal Judicial action, in different causes.[34]

§ 695. **Different Principles of Interpretation.**

It is not essential to Federal following of a State decision Interpretative of State text, that the principles of Interpretation adopted and applied by the State Court be in harmony with Federal principles of Interpretation.[35]

§ 696. **State Interpretation (Federally Followed) as: (a) Validative, or (b) Invalidative, of State Written Law.**

From what has been said, in general, in the present Chapter, of Federal Adoption and following of State Interpretation of State Written Law, it follows:

1]* That where a certain State text is, in its letter, capable of either one of two distinct and separate interpretations, on one of which it will, and on the other of which it will not, be consistent with Federal law; in such case, State interpretation to the former effect has, (being Federally followed), the operation of validating the State text in question;[36]

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[34]Central R. R. v. Jersey City, 209 U. S. 473; S 28:592; L 52:896; Maiorano v. Baltimore & O. R. R., 213 U. S. 268; S 29:424; L 53:792. See Kidd, Dater Co. v. Musselman Grocer Co., 217 U. S. 461; S 30:606; L 54:839.

[35]Smiley v. Kansas, 196 U. S. 447; S 25:289; L 49:546.

*Dark-faced numerals are inserted merely for convenience of reference.

[36]Louisville, N. O. & Tex. Ry. v. Mississippi, 133 U. S. 587; S 10:348; L 33:784; In re Graham, 138 U. S. 461; S 11:363; L 34:1051; Noble v. Mitchell, 164 U. S. 367; S 17:110; L 41:472; Osborne v. Florida, 164 U. S. 650; S 17:214; L 41:586; Missouri, Ks. & Tex. Ry. v. McCann, 174 U. S. 580; S 19:755; L 43:1093; Chesapeake & O. Ry. v. Kentucky, 179 U. S. 388; S 21:101; L 45:244; King v. Portland, 184 U. S. 61; S 22:290; L 46:431; Schaefer v. Werling, 188 U. S. 516; S 23:449; L 47:570; Zane v. Hamilton County, 189 U. S. 370; S 23:538; L 47:858; Pullman Co. v. Adams, 189 U. S. 420; S 23:494; L 47:877; Smiley v. Kansas, 196 U. S. 447; S 25:289; L 49:546; National Cotton Oil Co. v. Texas, 197 U. S. 115; S 25:379; L 49:689; Powers v. Detroit, Grand Haven & Milw. Ry., 201 U. S. 543; S 26:556; L 50:860; New York Centr. R. R.

2] while State decision to the latter effect operates, (being Federally followed,) to invalidate such text.[37]

3] Such validation may occur, of a specific portion only, of a text, by State decision, (Federally followed), of separability of such portion.[38]

4] When, however, no such saving interpretation is given by the State Courts, but a text is so viewed by them as to be Federally invalid, it is not competent to a State Court vested by the laws of the State only with Judicial powers, to cure the defect, (and validate the Written law in question), for a particular case, simply by inserting into the judgment a qualificatory proviso.[39]

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v. Miller, 202 U. S. 584; S 26:714; L 50:1155; Gatewood v. North Carolina, 203 U. S. 531; S 27:167; L 51:305.

Bacon v. Walker, 204 U. S. 311; S 27:289; L 51:499; Ughbanks v. Armstrong, 208 U. S. 481; S 28:372; L 52:582; Cleveland, Cinn., etc. Ry. v. Porter, 210 U. S. 177; S 28:647; L 52:1012; Hammond Packing Co. v. Arkansas, 212 U. S. 322; S 29:370; L 53:530; Welch v. Swasey, 214 U. S. 91; S 29:567; L 53:923; Brown-Forman Co. v. Kentucky, 217 U. S. 563; S 30:578; L 54:883; Chicago, Indianapolis, etc. Ry. v. Hackett, 228 U. S. 559; S 33:581; L 57:966; Adams v. Milwaukee, 228 U. S. 572; S 33:610; L 57:971.

[37]Hall v. De Cuir, 95 U. S. 485; L 24:547; Barnitz v. Beverly, 163 U. S. 118; S 16:1042; L 41:93; Missouri Pac. Ry. v. Nebraska, 164 U. S. 403; S 17:130; L 41:489; Booth v. Illinois, 184 U. S. 425; S 22:425; L 46:623; Allen v. Pullman Co., 191 U. S. 171; S 24:39; L 48:134; Carstairs v. Cochran, 193 U. S. 10; S 24:318; L 48:596; Cleveland v. Cleveland City Ry., 194 U. S. 517; S 24:756; L 48:1102; Central of Georgia Ry. v. Murphey, 196 U. S. 194; S 25:218; L 49:444; San Francisco Bank v. Dodge, 197 U. S. 70; S 25:384; L 49:669; Northwestern L. Ins. Co. v. Riggs, 203 U. S. 243; S 27:126; L 51:168; Mississippi R. R. Comm. v. Illinois Centr. R. R., 203 U. S. 335; S 27:90; L 51:209; Gatewood v. North Carolina, 203 U. S. 531; S 27:167; L 51:305; Watson v. Maryland, 218 U. S. 173; S 30:644; L 54:987; South Covington Ry. v. Covington, 235 U. S. 537; S 35:158; L 59:350; Rossi v. Pennsylvania, 238 U. S. 62; S 35:677; L 59:1201; Adams Ex. Co. v. Kentucky, 238 U. S. 190; S 35:824; L 59:1267.

[38]As in Chesapeake & O. Ry. v. Kentucky; National Cotton Oil Co. v. Texas; Gatewood v. North Carolina; South Covington Ry. v. Covington, all cited above.

[39]Thus, when the text in question was a text of a State Constitution, and the feature of invalidity consisted of absence of provision for compensation for property to be taken for public use, it was held not competent to a State Court, possessing only the usual Judicial powers, to cure the defect for a particular case, by inserting in the judg-

§ 697. Analogy in Respect of Local Decisions in Federal States.

What has been said above, in this Chapter, is applicable, mutatis mutandis, to Judicial decisions of Courts of a Federal State.[40]

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ment a provision for compensation. Louisville & Nashv. R. R. v. Central Stock Yards Co., 212 U. S. 132; S 29:246; L 53:441.

[40]Robinson & Co. v. Belt, 187 U. S. 41; S 23:16; L 47:65; Gutierres v. Albuquerque Co., 188 U. S. 545; S 23:338; L 47:588; Copper Queen Co. v. Arizona, 206 U. S. 474; S 27:695; L 51:1143; Lewis v. Herrera, 208 U. S. 309; S 28:412; L 52:506; Crary v. Dye, 208 U. S. 515; S 28:360; L 52:595; Ponce v. Roman Catholic Church, 210 U. S. 296; S 28:737; L 52:1068; English v. Arizona, 214 U. S. 359; S 29:658; L 53:1030; Santa Fe County v. Coler, 215 U. S. 296; S 30:111; L 54:202; Clason v. Matko, 223 U. S. 646; S 32:392; L 56:588; Phœnix Ry. v. Landis, 231 U. S. 578; S 34:179; L 58:377; Santa Fe Centr. Ry. v. Friday, 232 U. S. 694; S 34:468; L 58:802; Cardona v. Quinones, 240 U. S. 83; S 36:346; L 60:538.

BOOK IX.

THE FEDERAL INTRA-STATE ORIGINAL JURISDICTION.

PART I.—CERTAIN PRINCIPLES OF GENERAL CHARACTER.

PART II.—THE FEDERAL NON-EXCLUSIVE ORIGINAL COMMON LAW AND EQUITY JURISDICTION (718—784).[1]

[1] "Non-Exclusive": ("Concurrent").

PART I.

CERTAIN PRINCIPLES OF GENERAL CHARACTER.

CHAPTER CXXVI.

"Inferior" Courts.[1]

§ 698. Definition.

The "inferior courts" intended by the Constitutional text cited, are Courts (a) established in and for State area proper, and (b) vested with Jurisdiction in terms provided for or contemplated by the Constitution.[2]

Thus, (1) the provision in respect of "inferior courts" has no application to Federal Courts established within or for Federal area, whether established (a) directly by Congress, (as in the case of the District of Columbia), or (b) by a Federal State.[3]

So, (2) of Federal Courts of exceptional character, sitting within a State, of Jurisdiction other than that specifically dealt with by the Constitution: as, Treaty Courts, so called.[4]

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[1]Const., Art. III:—

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

[2]I. e., by the text cited, or by other specific texts, as, the Bankruptcy text.

[3]See Federal States.

[4]As an Incident of the power of Treaty, the United States has power of establishment, by Treaty, of Judicial tribunals for ascertainment of particulars (of law or of fact) dealt with only in a general way by a Treaty in question. Such Courts are not "inferior Courts" in the sense of the Constitutional text in question. Comegys v. Vasse, 1 Pet. 193; L 7:108; Sheppard v. Taylor, 5 Pet. 675; L 8:269; Frevall v. Bache, 14 Pet. 95; L 10:369; Bachman v. Lawson, 109 U. S. 659; S 3:479; L 27:1067; Frelinghuysen v. Key, 110 U. S. 63; S 3:462; L 28:71; Burthe v. Denis, 133 U. S. 514; S 10:335; L 33:768; Boynton v. Blaine, 139 U. S. 306; S 11:607; L 35:183; Williams v. Heard, 140 U. S. 529; S 11:885; L 35:550; Butler v. Gorely, 146 U. S. 303; S 13:84; L 36:981.

Possibly such Courts should be classed as Executive, rather than

§ 699. Potential Secondary Judicial Capacity of Inferior Courts, Properly So-Called.

Inferior Courts of the United States, within the sense of that term in the text in question, may be vested with Jurisdiction, Original or Appellate, not within Jurisdictional fields specifically dealt with or specifically contemplated by the Constitution: as (a) Original or Appellate Jurisdiction in respect of Federal areas;[5] or (b) quasi-Jurisdiction, as Courts of Claims.[6]

In so far, they are not "inferior courts" of the United States, within the Constitutional text in question.

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as of Judicial character. Thus, the Federal Executive Branch may be vested with a certain degree of discretionary Revisory power in respect of awards of such Courts. Boynton v. Blaine, cited above.

[5]Jud. Code:—

§ 26. The district court for the district of Wyoming shall have jurisdiction of all felonies committed within the Yellowstone National Park, and appellate jurisdiction of judgments in cases of conviction before the commissioner authorized to be appointed under § 5 of an act entitled "An Act to protect the birds and animals in Yellowstone National Park, and to punish crimes in said Park, and for other purposes," approved May seventh, eighteen hundred and ninety-four.

§ 27. The district court of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the State of South Dakota.

[6]Jud. Code, § 24:—

The district courts shall have original jurisdiction as follows:

* * * * * * * * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court * * *.

§ 700. Appellate Jurisdiction.

The term "inferior courts", in the Constitutional text in question, is not limited to Federal Courts of Original Jurisdiction, but extends to potential Appellate Courts. Thus, the Circuit Courts of Appeals are within the text.

§ 701. The Question of Potential Executive Duties.

In some instances, Judges of inferior Federal Courts have, ex officio, been vested by Congress with powers of Executive character.[7]

Their duties, in such case, are of Ministerial, not of Judicial character.[8]

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[7]Hayburn's Case, 2 Dal. 409; L 1:436; United States v. Ferreira, 13 How. 40, 49, 50, 52, note; L 14:42; Muskrat v. United States, 219 U. S. 346; S 31:250; L 55:246.

[8]Cases cited.

CHAPTER CXXVII.

FEDERAL JUDICIAL EXCLUSIVENESS IN ORIGINAL JURISDICTION.

§ 702. In the Supreme Court.[1]

In certain portions of the field covered by the text cited, the jurisdiction of the Supreme Court may be exclusive by force of this text. If, or in so far as, this is not true, the field is covered by the Congressional text cited in the following section.

§ 703. In the Inferior Courts of Original Jurisdiction.[2]

1. Certain of the provisions of the text here cited seem to be of mere Declaratory character. [3]

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[1]Const., Art. III, § 1:—

* * * In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. * * *

[2]Jud. Code, § 256:—

The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy; where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fifth. Of all cases arising under the patent-right, or copyright laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls.

[3]As, clauses "First" and "Second" (see our §§ 518-522; 585-587; 709, par. 2).

2. Certain other portions may be merely repetitive of (the legal effect of) certain Constitutional provisions.[4]

3. The Code text cited, (a) is not exhaustive of the Code text as a whole, in the field in question;[5] and (b) is subject to certain Congressional provisions extraneous to the Judicial Code.[6]

§ 704. Illustration of Non-Exclusiveness.

Illustrative examples of classes of suits not within the contemplation of the text above cited are presented in the margin.[7]

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[4]As, clauses Third, Fourth, Fifth, Sixth, and Eighth.

[5]See, for example, Jud. Code, § 24, clause Sixteenth (as to suits by or in behalf of the United States against a national bank, or suits for winding up such a bank, or suits to enjoin the Comptroller of the Currency or his receiver); clause Twentieth (Jurisdiction concurrent with that of the Court of Claims); clause Twenty-first (suits based upon violation of the Federal Public lands law); clause Twenty-second (alien immigration suits and alien contract labor suits); clause Twenty-fourth (Indian lands allotment suits).

[6]United States v. Dalcour, 203 U. S. 408; S 27:58; L 51:248.

See our § 665.

[7]In the absence of specific Federal legislation to the contrary, an assignee in (Federal) Bankruptcy may sue in a State Court to recover assets of the bankrupt. Claflin v. Houseman, 93 U. S. 130; L 23:833.

So of suit in a State Court, on a Federal Judicial bond. Tullock v. Mulvane, 184 U. S. 497; S 22:372; L 46:657; Missouri, Ks. & Tex. Ry. v. Elliott, 184 U. S. 530; S 22:446; L 46:673.

The statutory right of a shareholder of a national bank, to inspect books of the bank, is enforceable in a State Court. Guthrie v. Harkness, 199 U. S. 148; S 26:4; L 50:130.

So of an action for damages under Congressional interstate Commerce legislation. Galveston etc. Ry. v. Wallace, 223 U. S. 481; S 32:205; L 56:516.

See, also, under Federal Question (§§ 681-684); State Judicial Power and Duty of Enforcement of Federal Law (§ 657).

CHAPTER CXXVIII.

THE SUPREME COURT IN ITS ORIGINAL JURISDICTION.[1]

§ 705. General View.

The Original Jurisdiction of the Supreme Court is not capable of enlargement (as, of course, it is not subject to diminution) by Congress.[2]

This doctrine looks to Substance, not to Form. Jurisdiction which is, in substance, Original, in character, cannot be vested by Congress, by indirection: as, by Procedure, Appellate in form, but amounting, in substance, to transfer of a case (in the stage of Original Jurisdiction) from a lower Federal Court to the Supreme Court.[3]

Pursuant to the principle above stated, the Congressional provision for Prohibition and Mandamus from the Supreme Court,[4] is limited, in legal effect, to issue of those writs in

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[1]Const., Art. III:—

> * * * In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. * * *

[2]Marbury v. Madison, 1 Cr. 137; L 2:60; United States v. Bailey, 9 Pet. 267; L 9:124; Adams v. Jones, 12 Pet. 207; L 9:1058; White v. Turk, 12 Pet. 238; L 9:1069; The Alicia, 7 Wall. 571; L 19:84; United States v. Perrin, 131 U. S. 55; S 9:681; L 33:88; Baltimore & O. R. R. v. Interstate Com. Comm., 215 U. S. 216; S 30:86; L 54:164; Muskrat v. United States, 219 U. S. 346; S 31:250; L 55:246.

[3]Cases cited above.

It is upon the ground above stated that a statutory Certificate from a lower Federal Court cannot present to the Supreme Court questions of fact (or conclusions of fact). See Certificate, and cases thereunder cited (§ 848).

[4]Jud. Code, § 234:—

> The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice-consul is a party * * *

aid of the Appellate Jurisdiction of the Supreme Court of the United States.[5]

While the Supreme Court, as a Court, is thus limited in respect of Original Jurisdiction, the individual Justices may be made ex officio Judges of inferior Federal Courts of general Original Jurisdiction.[6]

What is said, at a later point, of Motive and Intent, in respect of the Common Law and Equity Jurisdiction of the District Courts,[7] may be assumed to be applicable, mutatis mutandis, as far as pertinent, to the field now in question.

Thus, where suit was brought in the Supreme Court (in its Original Jurisdiction) by one State against another State, upon bonds of the latter State, it was not material that the bonds were acquired by the plaintiff State as a gift from a private person, owning other such bonds, with the object, in the donor's mind, of establishment, as matter of law, of liability of the defendant State.[8]

§ 706. Suits between States.

The establishment by the Constitution, of liability of a State of the Union to suit by a sister State, was based upon the absence of power of resort to force, and was intended as a measure of compulsory arbitration, to take the place of force.[9]

The liability to such suit is not, however, limited to matters of strictly public character, but is general in scope.[10]

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[5]Marbury v. Madison, 1 Cr. 137, cited above; In re Massachusetts, 197 U. S. 482; S 25:512; L 49:845; In re Glaser, 198 U. S. 171; S 25:653; L 49:1000.

[6]Hamilton v. Russel, 1 Cr. 310; L 2:118 (confirming a then established usage).

[7]§§ 780, 781.

[8]South Dakota v. North Carolina, 192 U. S. 286; S 24:269; L 48:448.

[9]Hans v. Louisiana, 134 U. S. 1, 15 et seq.; S 10:504; L 33:842; Louisiana v. Texas, 176 U. S. 1, 15; S 20:251; L 44:347; Virginia v. West Virginia, 220 U. S. 1, 27, 36; S 31:330; L 55:353.

[10]Thus, a State being the absolute owner of bonds of another State, secured by an Equitable mortgage of corporate stock, owned by the latter State, may sue upon such bonds, and have foreclosure of the mortgage. South Dakota v. North Carolina, 192 U. S. 286; S 24:269; L 48:448.

Cases of suits between States are: Rhode Island v. Massachusetts, 11 Pet. 226; L 9:697; 12 Pet. 657; L 9:1233; 12 Pet. 755; L 9:1272; 13 Pet. 23:L 10:41; 14 Pet. 210; L 10:423; 15 Pet. 233; L

§ 707. **Suit between a State and a Foreign State.**[11]

The term "foreign States", in this text, does not include an Indian nation.[12]

§ 708. **"Affecting".**[13]

The scope, in legal effect, of the term "affecting" is necessarily matter of degree. Under the general principles of Federal Question, there must be a substantial degree of relation, to bring a situation within the text.[14]

§ 709. **Suit by a State against a Private Individual.**[15]

1. In suit by a State against citizens of another State, it is essential to jurisdiction that all the defendants be of a State (or of States) other than the plaintiff State.[16]

So, we may assume, in the case of foreign citizens or subjects.

For the purposes now in question, a corporation created by a State, is a citizen of that State.[17]

2. By force of the Constitutional adoption, for Federal purposes generally,[18] of the general Law of Nations, there is operative, in the field now in question, the principle that

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10:721; 4 How. 591; L 11:1116; Alabama v. Georgia, 23 How. 505; L 16:556; Missouri v. Illinois & Chicago Dist., 180 U. S. 208; 200 U. S. 496; S 21:331; L 45:497; Virginia v. West Virginia, 206 U. S. 290; S 27:732; L 51:1068; 209 U. S. 514; S 28:614; L 52:914; 220 U. S. 1; S 31:330; L 55:353; 222 U. S. 17; S 32:4; L 56:71; 234 U. S. 117; S 34:889; L 58:1243; 238 U. S. 202; S 35:795; L 59:1272; 241 U. S. 531; S 36:719; L 60:1147; Missouri v. Kansas, 213 U. S. 78; S 29:417; L 53:706.

[11]Const., Art. III, § 1:—

* * * between a State * * * and foreign States * * *

[12]Cherokee Nation v. Georgia, 5 Pet. 1; L 8:25.

[13]* * * "to all cases affecting ambassadors, other public ministers, and consuls;" * * *

[14]Thus, a Federal Criminal prosecution for violation of the Law of Nations, by an assault upon an Ambassador, is not within the text. United States v. Ortega, 11 Wh. 467; L 6:521.

[15]Const., Ubi supra:—

* * * "to controversies * * * between a State and citizens of another State; * * * and between a State * * * and foreign * * * citizens or subjects".

[16]California v. Southern Pac. Co., 157 U. S. 229; S 15:591; L 39:683.

[17]Wisconsin v. Pelican Ins. Co., 127 U. S. 265; S 8:1370; L 32:239.

[18]§ 551.

presumptively, and in general, one political society does not enforce Criminal or Penal laws of another political society; and the Constitutional text now immediately in question is thereby correspondingly qualified in legal effect, and does not extend to suit for enforcement of Penal law of the plaintiff State,[19] or, a fortiori, of Criminal law of the State.[20]

§ 710. Absence of Advisory Jurisdiction.

At the Common Law, in England, it was competent to the Crown, or to Parliament, to require an Opinion from the Judicial Branch, upon a question of law. The practice is continued, in a certain degree, to the present day, in some of our States.[21]

The Constitution of the United States contains no specific provision to this effect; and Congress has no power of establishing the practice in respect of the Supreme Court.[22]

The principle looks to substance, not to form. Mere forensic form is not sufficient to give the Supreme Court jurisdiction.[23]

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[19]Wisconsin v. Pelican Ins. Co., 127 U. S. 265; S 8:1370; L 32: 239; Oklahoma v. Gulf, Colorado & S. F. Ry., 220 U. S. 290; S 31: 437; L 55:469. This limitation, dealing with Substance, and not with Form, extends, for example, to a State judgment based upon Penal liability. Case first above cited.

[20]See cases cited above.

[21]See United States v. Evans, 213 U. S. 297, 300; S 29:507; L 53: 803.

[22]United States v. Evans, cited above; Muskrat v. United States, 219 U. S. 346; S 31:250; L 55:246. See, also, Hayburn's Case, 2 Dall. 409; L 1:436; United States v. Ferreira, 13 How. 40; L 14:42.

[23]Thus, an Act of Congress providing for a Writ of Error in favor of the United States, in Criminal cases, after a verdict of not guilty, but without disturbance of the verdict, in the particular case, was held simply to amount to a provision for an advisory opinion for subsequent cases, and invalid. United States v. Evans, cited above.

So, of an Act of Congress, aiming to reach the same result through moot procedure in the Court of Claims. Muskrat v. United States, cited above.

It is of no avail that in mere colorable litigation, designed to effect the obtaining of an opinion, the United States is a party of record. Cases cited above.

See Moot Case (§§ 590, 591).

CHAPTER CXXIX.

THE FEDERAL JUDICIAL DISTRICTS:—DIVERSITY; SOLIDARITY.

§ 711.

The division of the aggregate of State area into Federal Judicial Districts, is, for Civil Jurisdiction, at least, a matter of mere Congressional policy, in the interest of practical convenience.[1]

To certain purposes, the District division is disregarded: as, in respect of running of process, in exceptional classes of suits, throughout the Realm, or throughout State area,[2] and in the inherent competency of the District Court of any District to take jurisdiction of a Common Law or Equity suit capable of being entertained in any other District, if right to venue in such other District is not insisted upon.[3]

In general, however, for Civil suits, the several Districts are put, by Congress, upon the footing of separate and independent political societies, both (a) inter se, and (b) as between a District and a State or a Federal State: with application, pro tanto, of the law of Nations, in its dealing with co-ordinate political societies.[4]

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[1]See United States v. Union Pac. R. R., 98 U. S. 569, 602-604; L 25:143; Robertson v. Howard, 229 U. S. 254; S 33:854; L 57:1174.

[2]Bankruptcy Act; Admiralty Procedure; Sherman Act. See cases last above cited.

[3]See Venue (§§ 740-745).

[4]Borer v. Chapman, 119 U. S. 587; S 7:342; L 30:532; (res judicata, as between two Federal Districts); Kent v. Lake Superior Canal Co., 144 U. S. 75; S 12:650; L 36:352; (modification or correction of a decree of a District Court in Equity, not to be sought in another District Court).

National Tube Works v. Ballou, 146 U. S. 517; S 13:165; L 36:1070: the preliminary (Common Law) judgment, (required for maintenance in a Federal Court, of a creditor's bill proper), must, if rendered in another Federal District, be sued upon again, (and reduced to Common Law judgment again) in the District Court of the Equity suit.

Riverdale Mills v. Manufacturing Co., 198 U. S. 188; S 25:629; L

49:1008; Great Western Mining Co. v. Harris, 198 U. S. 561; S 25: 770; L 49:1163; Lazarus v. Prentice, 234 U. S. 263; S 34:851; L 58:1305 (ancillary suit, as between two Federal Districts, even—case last cited—in Bankruptcy).

Washington-Virginia Ry. v. Real Estate Trust Co., 238 U. S. 185; S 35:818; L 59:1262 (constructive presence, for service).

CHAPTER CXXX.

DISMISSAL, BY A DISTRICT COURT, SUA SPONTE, FOR ABSENCE OF JURISDICTION.

§ 712. Apart from Specific Congressional Provision.

Prior to specific Congressional action upon the matter, the inferior Courts of the United States had power (and would seem to have been under a duty) to dismiss a cause for absence of jurisdiction, appearing of record.[1]

§ 713. The Congressional Text.

The field is now covered by Act of Congress.[2]

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[1]Capron v. Van Noorden, 2 Cr. 126; L 2:229; Dred Scott v. Sandford, 19 How. 393; L 15:691; Hartog v. Memory, 116 U. S. 588, 590 et seq.; S 6:521; L 29:725; Steigleder v. McQuesten, 198 U. S. 141, 142; S 25:616; L 49:986; Gilbert v. David, 235 U. S. 561, 567; S 35:164; L 59:360.

[2]Act of March 3, 1875, 18 Stat. 470; Jud. Code, § 37:—

> If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

See Mansfield etc. Ry. v. Swan, 111 U. S. 379; S 4:510; L 28:462; Hancock v. Holbrook, 112 U. S. 229; S 5:115; L 28:714; Hartog v. Memory, 116 U. S. 588; S 6:521; L 29:725; King Bridge Co. v. Otoe County, 120 U. S. 225; S 7:552; L 30:623; Robinson v. Anderson, 121 U. S. 522; S 7:1011; L 30:1021; Blacklock v. Small, 127 U. S. 96; S 8:1096; L 32:70; Cameron v. Hodges, 127 U. S. 322; S 8:1154; L 32:132; Metcalf v. Watertown, 128 U. S. 586; S 9:173; L 32:543; Hanrick v. Hanrick, 153 U. S. 192; S 14:835; L 38:685; Neel v. Pennsylvania Co., 157 U. S. 153; S 15:589; L 39:654; Wetmore v. Rymer, 169 U. S. 115; S 18:293; L 42:682; Steigleder v. McQuesten, 198 U. S. 141; S 25:616; L 49:986; Louisville & Nashv. R. R. v. Mottley, 211 U. S. 149; S 29:42; L 53:126; Gilbert v. David, 235 U. S. 561; S 35:164; L 59:360.

Inquiry may be made outside the record.[3]

As a result of such legislation, the requirement upon parties, in respect of time and of form of challenge of Jurisdiction of a District Court, is greatly relaxed.[4]

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[3]Wetmore v. Rymer; Steigleder v. McQuesten, both cited above.

[4]Gilbert v. David, (cited above), at p. 567. See also under Jurisdictional Amount.

As to such power and duty of a Federal Appellate Court, in respect of Appellate Jurisdiction, as such, see Appeal and Error, § 788.

CHAPTER CXXXI.

FEDERAL ASSUMPTION, BY REMOVAL, OF JURISDICTION OF STATE CRIMINAL OR PENAL CAUSES.[1]

§ 714. The Subject Generally.

The Federal Procedure now in question has been viewed as, in terms, provided for by the "common law" provision

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[1]Jud. Code, § 31:—

When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or can not enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. * * *

§ 33 as Amended by Act of Aug. 23, 1916 (39 Stats. 532):—

That when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court

of the Judiciary Article (Art. III) of the Constitution, in

next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpœna, petition, or any other process except capias, the clerk of the district court shall issue a writ of certiorari to the State court requiring it to send to the district court the record and the proceedings in the cause. When it is commenced by capias or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the State court or left at his office by the marshal of the district or his deputy or by some other person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed de novo and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non prosequitur may be rendered against him, with costs for the defendant.

As to Civil Removal, above provided for, see Removal, Exceptional (§ 730).

the operation of that provision upon Original Federal Jurisdiction.[2]

It has, however, been viewed[3] as capable of being rested upon the general-legislation text of the Constitution,[4] or upon a broad doctrine of Unwritten Federal Organic law.[5]

In such Procedure, the Federal Courts are viewed as acting, not as Courts of a Sovereignty foreign to the State in question, but as sister Courts of the State,[6] in enforcement of substantive Criminal law of the State.[7]

A prosecution against a person of the African race is removable where the jury law of the State discriminates against such persons.[8] The mere fact, however, that text of State Written law, long ante-dating the Fourteenth Amendment, is in conflict with that Amendment, is not ground for Removal, where there is nothing to offset the presumption that the State Courts will recognize the annulment or modification of such text by that Amendment.[9] A fortiori is this true where, before initiation of the prosecution, the State Court of final authority has recognized such operation of the Fourteenth Amendment upon the text in question.[10]

Judicial action had in a State Court in the course of a

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[2]Tennessee v. Davis, 100 U. S. 257, 264; L 25:648; ad init.: "This provision" * * *.

[3]Case cited at p. 263, last par.

[4]Art. I, § 8:—

> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department thereof.

[5]Case cited, at p. 262, (ad fin.); p. 263. (As to such doctrine, see §§ 26, 27).

[6]Case cited, p. 271, ad fin.: "They are not" * * *

[7]Case cited.

Various questions of Procedure after Removal might arise, as the questions (a) of operativeness, for Federal trial, of a State grand jury hearing and indictment (or information) in accordance with such Federal Procedure proper; (b) of operativeness of such State Procedure not in accordance with Federal Procedure proper; (c) of requirement, in the latter case, of Federal grand jury Procedure.

[8]Strauder v. West Virginia, 100 U. S. 303; L 25:664.

[9]Neal v. Delaware, 103 U. S. 370; L 26:567: (the defendant's remedy in case of State Judicial action to the contrary being, by Federal Review of the State judgment, if adverse to him).

[10]Bush v. Kentucky, 107 U. S. 110; S 1:625; L 27:354.

trial, (as, in respect of challenge of, or qualifications of, jurors), is not ground of Removal.[11]

A prosecution is not removable at the stage of mere holding of the accused, by a committing-magistrate.[12]

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[11]Virginia v. Rives, 100 U. S. 313; L 25:667; Neal v. Delaware, cited above; Gibson v. Mississippi, 162 U. S. 565; S 16:904; L 40:1075.

[12]Virginia v. Paul, 148 U. S. 107; S 13:536; L 37:386.

CHAPTER CXXXII.

MANDAMUS, INJUNCTION OR HABEAS CORPUS TO EXECUTIVE OFFICIALS.—HABEAS CORPUS TO STATE JUDICIAL OFFICIALS.

§ 715. To Federal Executive Officials.

Congressional legislation does not (unless perhaps in some exceptional instances) provide, in specific terms, for suit against persons holding Federal office, (a) to enforce action by, or (b) to inhibit proposed action by, such a person in his official capacity. General Common Law or Equity Jurisdiction (as the case may be) in a Federal intra-State Court of Original Jurisdiction directly established by Congress, embraces Mandamus or Injunction or Habeas Corpus as against such an official,[1] subject to the qualification that such Judicial power does not and cannot exist as against the President,[2] even in so extreme a case as that of claim of nullity, by Federal Organic law, of an Act of Congress under (or under color of) which the President is alleged to be acting or to propose action.[3]

In such Mandatory, or Injunctive, or Habeas Corpus Procedure (where, and in so far as it lies) general Common Law or Equity principles are followed.

Thus, (in analogy to suit, in general, against representative private persons),[4] a suit of such character has a two-fold aspect: (a) it is a suit against the defendant as an individual, in that it does not survive his death or retirement from office;[5] (b) it is a suit against him as an official, in that judgment for the plaintiff results in an order of (or of refraining from) official action.[6]

So, such Jurisdiction—while extending to purely Administrative action, in general,[7]—does not extend to the

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[1]Cases cited below.

[2]See Mississippi v. Johnson, 4 Wall. 475; L 18:437.

[3]Case cited.

[4]E. g., executors, administrators, receivers, and the like.

[5]§ 605. [6]Cases cited below.

[7]Kendall v. United States, 12 Pet. 524; L 9:1181; United States

situation in which the officer in question is, in his Executive official capacity, vested (as to the issue in question) with functions of Judicial character, or with discretion,[8]—there being, however, from the nature of the case, a debatable ground in which Judicial or discretionary power exists, in the Executive Branch, only in a certain degree, and with only presumptive Exclusiveness as against the Federal Jurisdiction in question.[9]

§ 716. To State Executive Officials.

What is said above, in respect of Federal Executive officials, is true, mutatis mutandis, in respect of Review by a Federal Common Law or Equity Court of Original Jurisdiction, of action of State Executive officials,—general Federal Jurisdictional conditions being present.

This subject is treated incidentally at various other points, with citation of cases.[10]

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v. Black, 128 U. S. 40; S 9:12; L 32:354; Parish v. MacVeagh, 214 U. S. 124; S 29:556; L 53:936.

[8]Decatur v. Paulding, 14 Pet. 497; L 10:559; Brashear v. Mason, 6 How. 92; L 12:357; United States v. Guthrie, 17 How. 284; L 15:102; Gaines v. Thompson, 7 Wall. 347; L 19:62; United States v. Black, cited above; Redfield v. Windom, 137 U. S. 636; S 11:197; L 34:811; School of Magnetic Healing v. McAnnulty, 187 U. S. 94; S 23:33; L 47:90; Houghton v. Payne, 194 U. S. 88; S 24:590; L 48:888; Bates & Guild Co. v. Payne, 194 U. S. 106; S 24:595; L 48:894; National L. Ins. Co. v. National L. Ins. Co., 209 U. S. 317; S 28:541; L 52:808; Goldberg v. Daniels, 231 U. S. 218; S 34:84; L 58:191; Gegiow v. Uhl, 239 U. S. 3; S 36:2; L 60:114.

[9]School of Magnetic Healing v. McAnnulty; Bates & Guild Co. v. Payne, both cited above.

Suits of the character in question are commonly (if not invariably) brought in the District of Columbia, when directed against a Federal official there officially located; but when directed against a Federal official officially located in a State, they have been maintained in the corresponding Federal Judicial District. School of Magnetic Healing v. McAnnulty; National L. Ins. Co. v. National L. Ins. Co., both cited above.

See, also, Noble v. Union River Logging R. R., 147 U. S. 165; S 13:271; L 37:123; New Orleans v. Paine, 147 U. S. 261; S 13:303; L 37:162; White v. Berry, 171 U. S. 366; S 18:917; L 43:199; Roberts v. United States, 176 U. S. 221; S 20:376; L 44:443; Garfield v. Goldsby, 211 U. S. 249; S 29:62; L 53:168.

[10]See Property (generally); Contract; Franchise; Remedy.

It may be convenient, however, to cite, at the present point, certain typical illustrative decisions.[11]

§ 717. Habeas Corpus, as against State Judicial Action.

In a situation in which Remedy in the ordinary course is not practicable, or would not sufficiently protect Federal governmental interests, Habeas Corpus may be resorted to by an inferior Federal Court of Original Jurisdiction, to control State Judicial action.

The general proposition, and its qualifications, are illustrated in cases here cited.[12]

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[11]Mandamus to levy tax for satisfaction of a Federal judgment:—
Riggs v. Johnson County, 6 Wall. 166; L 18:768; Mayor v. Lord, 9 Wall. 409; L 19:704; Wolff v. New Orleans, 103 U. S. 358; L 26:395; Cherokee County v. Wilson, 109 U. S. 621; S 3:352; L 27:1053; Nelson v. St. Martin's, 111 U. S. 716; S 4:648; L 28:574; Labette County v. Moulton, 112 U. S. 217; S 5:108; L 28:698; Seibert v. Lewis, 122 U. S. 284; S 7:1190; L 30:1161; Graham v. Folsom, 200 U. S. 248; S 26:245; L 50:464.

Whitten v. Tomlinson, 160 U. S. 231; S 16:297; L 40:406; Appleyard v. Massachusetts, 203 U. S. 222; S 27:122; L 51:161 (inter-State Extradition; Habeas Corpus denied).

See also Extradition (§§ 295-299) and cases cited.

[12]Habeas corpus sustained:—

In re Neagle, 135 U. S. 1; S 10:658; L 34:55.

Ohio v. Thomas, 173 U. S. 276; S 19:453; L 43:699; Boske v. Comingore, 177 U. S. 459; S 20:701; L 44:846 (in both cases, material State Judicial interference with Federal governmental action); Hunter v. Wood, 209 U. S. 205; S 28:472; L 52:747 (State Judicial action violative of a Federal Judicial order).

Habeas corpus refused:—

Ex parte Royall, 117 U. S. 241; S 6:734; L 29:868; New York v. Eno, 155 U. S. 89; S 15:30; L 39:80; Frank v. Mangum, 237 U. S. 309; S 35:582; L 59:969 (Criminal causes); Drury v. Lewis, 201 U. S. 1; S 26:229; L 50:343 (officer and soldier of the United States army indicted in a State Court in a situation involving a possible Federal defence); Pepke v. Cronan, 155 U. S. 100; S 15:34; L 39:84; (Contempt); Urquhart v. Brown, 205 U. S. 179; S 27:459; L 51:760 (State commitment of one as non compos mentis).

PART II.

THE FEDERAL NON-EXCLUSIVE ORIGINAL COMMON LAW AND EQUITY JURISDICTION.

CHAPTER CXXXIII.

PREFATORY.

§ 718. Certain Uses of Terms.

1. "FEDERAL QUESTION".—In the present Part, we shall employ the term "Federal Question" in the sense elsewhere (from a more general standpoint) defined.[1]

2. "INITIAL."—Federal suit, originally begun in a Federal District Court, and Federal Jurisdiction there originating, will be characterized as "initial" Federal suit or as "initial" Federal Jurisdiction, by way of distinction from Federal suit or Federal Jurisdiction by Removal from a State Court.

3. "LAND-GRANT".—The expression "land-grant" (suits) will be used to designate suits between citizens of the same State claiming lands under grants from different States.

4. "AMOUNT".—The term "amount" will be employed to designate the various Jurisdictional requirements of a certain amount in controversy.[2]

5. "NON-EXCLUSIVE".—We prefer this term, (as being, in our view, more exact) to the term "concurrent". The latter term fails to recognize dominance, in certain portions of the field, of the Federal, over State, Jurisdiction: as, in Removal.

§ 719. Definitions:—State; Foreign State; Citizen of a State; Citizen of a Foreign State; Corporation as a Citizen; Husband and Wife.

In the Constitutional and Congressional texts (cited in later sections) dealing (or in so far as dealing) with the subject-matter of the present Part, the term "State" does not include the Federal States;[3] the term "Foreign State" does not include the Indian nations (Tribes);[4] a State is

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[1] §§ 681 et seq. [2] §§ 685-687.

[3] Cherokee Nation v. Georgia, 5 Pet. 1; L 8:25; New Orleans v. Winter, 1 Wh. 91; L 4:44; Hooe v. Jamieson, 166 U. S. 395; S 17:596; L 41:1049.

[4] Cherokee Nation v. Georgia, cited above.

not a citizen of the State;[5] a corporation is a citizen of the Sovereignty or quasi-Sovereignty which created it,[6] (this principle extending to State municipal corporations);[7] with the corollaries: (a) of potential diversity of citizenship as between a corporation and one of its members,[8] (even where the member sues or is sued as such member);[9] and (b) of existence of each corporation as a corporation (and as a citizen) of some one, and of only that one, Sovereignty or quasi-Sovereignty.[10]

Husband and wife are not necessarily, at all times, and under all conditions, of like citizenship. The one may, at a given time, be a citizen of one State, and the other an alien, or a citizen of another State. From the standpoint, therefore, of Federal Jurisdiction (at Common Law or in Equi-

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[5]Stone v. South Carolina, 117 U. S. 430; S 6:799; L 29:962; Germania Ins. Co. v. Wisconsin, 119 U. S. 473; S 7:260; L 30:461; Postal Telegr. Cable Co. v. Alabama, 155 U. S. 482; S 15:192; L 39:231; Title Guaranty etc. Co. v. Allen, 240 U. S. 136; S 36:345; L 60:566 (cases of suit by a State, in one of its own Courts: not Removable on the ground of diversity of citizenship between the State and the defendant).

(In Ames v. Kansas, 111 U. S. 449; S 4:437; L 28:482; and in Southern Pac. R. R. v. California, 118 U. S. 109; S 6:993; L 30:103, the right of Removal of a suit brought by a State in one of its own Courts, rested, not upon diversity of citizenship, but on Federal question arising from Federal incorporation of the Removing party).

[6]Martin v. Baltimore & O. R. R., 151 U. S. 673; S 14:533; L 38:311; Wells Co. v. Gastonia Co., 198 U. S. 177; S 25:640; L 49:1003; Matter of Dunn, 212 U. S. 374; S 29:299; L 53:558; Macon Grocery Co. v. Atlantic Coast Line, 215 U. S. 501; S 30:184; L 54:300; many other cases; (the early view having been to the contrary. Bank of the United States v. Deveaux, 5 Cr. 61; L 3:38).

[7]Cowles v. Mercer County, 7 Wall. 118; L 19:86; Loeb v. Columbia Township, 179 U. S. 472; S 21:174; L 45:280 (see pp. 485, 486); many other cases.

[8]Doctor v. Harrington, 196 U. S. 579; S 25:355; L 49:606; various other cases.

[9]Ubi supra.

[10]E. g., of some one, and of only that one State: Hope Ins. Co. v. Boardman, 5 Cr. 57; L 3:36; Memphis etc. R. R. v. Alabama, 107 U. S. 581; S 2:432; L 27:518; Nashua R. R. v. Lowell R. R., 136 U. S. 356; S 10:1004; L 34:363; Patch v. Wabash R. R., 207 U. S. 277; S 28:80; L 52:204.

See Multi-Areal Corporate Groups, (§ 290).

ty) diversity of citizenship may exist as between husband and wife.[11]

§ 720. Certain Textual Aspects of Section 24 of the Judicial Code.

Pre-existing texts compiled in section 24 of the Judicial Code did not lend themselves readily to compilation; and, as a result, the section is not textually symmetrical. It may, therefore, be proper, at this point, to make a certain degree of analysis of the section.

(1) The whole affirmative grant of Jurisdiction by this section, in the field now in question, (that of the non-Exclusive Common Law and Equity Jurisdiction of the District Courts), is in the opening words of the section in question, and in certain portions of paragraph First thereof.[12]

(2) The remainder of the section, (in so far as it deals with the subject-matter of the present Part), either (a) embodies, or (b) otherwise deals with, limitations of the grant as above presented.

(3) Dealings with the matter of amount are as follows: —(a) Land-grant suits are (by force of position of the land-grant text of clause "First", anterior to the general Amount-text of that paragraph) not subject to an Amount limitation; (b) Federal Question suits, and diversity of citizenship suits, are, in general, subjected to a requirement of Amount;[13] (c) suits by or in behalf of the United States, are excepted from the amount requirement text, by the po-

[11]Barber v. Barber, 21 How. 582; L 16: 226 (Federal suit, by diversity of citizenship, upon a State alimony decree).

See Husband and Wife.

[12]The district courts shall have original jurisdiction * * *

First. Of all suits of a civil nature, at common law or in equity, * * * between citizens of the same State claiming lands under grants from different States; or where the matter in controversy * * * (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects.

The words here omitted from paragraph "First", contain no independent grant of Jurisdiction, but are, in subject-matter, repetitive of the Federal question clause (see "Federal Question"). As to their effect (solely by their textual position) in respect of amount, see below.

[13]("First") * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

sition in paragraph "First" of the clause dealing with such suits;[14] (d) certain other classes of Federal Question suits are exempted by paragraph "First" (ad finem).[15]

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[14]Such suits being suits of Federal question. See Federal Question.

[15]* * * Provided, however, That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

CHAPTER CXXXIV.

ULTIMATE EQUIVALENCY OF THE THREE JURISDICTIONAL GROUNDS (FEDERAL QUESTION, LAND-GRANT, AND DIVERSITY OF CITIZENSHIP.)

§ 721. The Question, Generally.

The Judiciary legislation—following the Judiciary Article of the Constitution—prescribes three distinct bases of the Federal Jurisdiction now in question: (1) Federal Question; (2) land-grant; (3) diversity of citizenship. When, however, in a particular suit, Federal jurisdiction has been established—upon any one of the three grounds above mentioned—the ground upon which it was established becomes,—for the further stages of the suit in the Original Jurisdiction—immaterial.

That is to say: (a) the field of inquiry and of judgment is the same, whether the jurisdiction originated upon one or upon another of the three grounds;[1] and (b) the jurisdiction is not ousted by disappearance, in the progress of the cause, of the original Jurisdictional ground, as:

1] By change of citizenship of a party, terminating the original (and then essential) diversity of citizenship;[2]

2] Or by reduction, pending suit, of the amount in controversy, to a sum below the amount originally essential to jurisdiction;[3]

3] Or by disappearance of the Federal question upon which the jurisdiction originally rested;[4]

4] Or by a denaturing, pending the suit, of a Federal question (the basis of the Federal Jurisdiction) by a de-

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[1]Thus, jurisdiction founded upon diversity of citizenship and amount, extends to a counter-claim not in itself involving those features. Kirby v. American Soda Fountain Co., 194 U. S. 141; S 24: 619; L 48: 911.

[2]Morgan's Heirs v. Morgan, 2 Wh. 290; L 4: 242.

[3]Scott v. Donald, 165 U. S. 58; S 17: 265; L 41: 632; Kirby v. American Soda Fountain Co., cited above.

[4]Siler v. Louisville & Nashv. R. R., 213 U. S. 175; S 29: 451; L 53: 753; Louisville & Nashv. R. R. v. Finn, 235 U. S. 601; S 35: 146; L 59: 379.

cision (in another case) destructive of the Federal-Question character, in the Jurisdictional sense;[5]

5] Or by the introduction of substituted new parties, terminating actual diversity of citizenship;[6]

6] Or by judgment favorable to (and thus eliminating) a defendant whose presence was originally essential to the jurisdiction;[7]

7] Or by change of interests upon which the original alignment of parties (originally essential to the jurisdiction) was based;[8]

8] Or by discontinuance, by the plaintiff, (operative as to his affirmative claim), if there is pending a counter-claim by the defendant;[9]

9] Or by a finding, adversely to the plaintiff, of a value less than the requisite Jurisdictional amount, without valid finding of absence of good faith in, or color for, the plaintiff's allegation of value.[10]

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[5]Michigan Centr. R. R. v. Vreeland, 227 U. S. 59; S 33:192; L 57:417.

[6]Clarke v. Mathewson, 12 Pet. 164; L 9:1041; Stewart v. Dunham, 115 U. S. 61; S 5:1163; L 29:329.

[7]Lathrop, Shea & Co. v. Interior Construction Co., 215 U. S. 246; S 30:76; L 54:177; Illinois Centr. R. R. v. Sheegog, 215 U. S. 308; S 30:101; L 54:208.

[8]Chicago v. Mills, 204 U. S. 321; S 27:286; L 51:504.

[9]Kirby v. American Soda Fountain Co., cited above.

[10]Smithers v. Smith, 204 U. S. 632; S 27:297; L 51:656.

See also §§ 753-759.

CHAPTER CXXXV.

INITIAL FEDERAL JURISDICTION; FEDERAL JURISDICTION BY REMOVAL.—INTER-RELATION; ESSENTIAL EQUIVALENCY; DISTINCTIONS.[1]

§ 722. The Congressional Texts:—General View.

1. INITIAL FEDERAL JURISDICTION.—The Judicial Code, in its dealing with initial Federal suit (in the general field now in question), vests initial Jurisdiction by a broad affirmative clause,[2]—this affirmative clause being subject to certain specific textual qualifications.[3]

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[1] "Initial": see § 718.

[2] § 24:—

The district courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: Provided, however, That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

[3] Judicial Code, § 24, clause Sixteenth:—

* * * And all National banking associations established under the laws of the United States shall, for the purposes of all other [i. e., all ordinary] actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

A suit by shareholders of a national bank against the directors, for

2. FEDERAL JURISDICTION BY REMOVAL:—TEXTS OF GENERAL CHARACTER.[4]

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making good, losses due to unauthorized investments, is within this clause. Herrmann v. Edwards, 238 U. S. 107; S 35:839; L 59:1224.

As to Congressionally incorporated railroads, see § 682, ¶ 9, ad fin., note.

[4]Jud. Code, § 28, as Amended by Act of Jan'y 20, 1914 (38 Stats. 278):—

> Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district * * * [exceptional Removal: as to which, see our § 730]. Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: Provided, That no case arising under an act entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States. And provided further, [Act of 1914, above referred to] That no suit brought in any State Court of competent jurisdiction against a railroad company, or other corporation or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier, under section twenty of the Act to regulate commerce; approved February fourth, 1887, as amended * * * shall be removed to any court of

The Judicial Code (as now Amended) in its general and affirmative aspects,[5] defines Federal Jurisdiction by Removal in terms of the non-Exclusive Federal initial Jurisdiction of Code section 24: with the corollary of Equivalency, in general, between (a) the "suit," or the "separable controversy," of this Removal text, and (b) the "suit" (issue) of section 24, Paragraph[6] First.

Such Equivalency is illustrated: (1) favorably to Removal, by Removal character of an Eminent Domain compensation issue arising under a State taking;[7] of a proceeding under a State statute, for setting aside a judgment;[8] and of a suit by a State in one of its own Courts, presenting a Federal question;[9] and (2) adversely to Removal, by non-Removability of a suit initiated by creditor's bill but (pursuant to State Procedure law) without prior judgment at law,[10] (the Federal Courts having—as matter of definition of Equity and of Equity Procedure—no initial Jurisdiction of such a suit);[11] by non-Removability[12] of a State suit Ancillary to an earlier State suit, (such Ancillary State suit not being capable of initial Federal Jurisdiction,

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the United States when the matter in controversy does not exceed the sum or value of $3,000.

Cases upon the qualificatory portions of texts above cited are: Kansas City So. Ry. v. Leslie, 238 U. S. 599; S 35:844; L 59:1478; Southern Ry. v. Lloyd, 239 U. S. 496; S 36:210; L 60:402.

[5]"General": as to exceptional Removal, see § 730.

"Affirmative": i. e., apart from the qualificatory texts above cited.

[6]The terms "suit", "controversy", "issue", and the like, being to this intent, interchangeable variants, (§§ 580 et seq.).

[7]Pacific R. R. Removal Cases, 115 U. S. 1; S 5:1113; L 29:319; Traction Co. v. Mining Co., 196 U. S. 239; S 25:251; L 49:462.

[8]Cowley v. Northern Pac. R. R., 159 U. S. 569; S 16:127; L 40:263.

[9]Ames v. Kansas, 111 U. S. 449; S 4:437; L 28:482; Southern Pac. R. R. v. California, 118 U. S. 109; S 6:993; L 30:103.

[10]Myers v. Swann, 107 U. S. 546; S 2:685; L 27:583; Cochran v. Montgomery County, 199 U. S. 260; S 26:58; L 50:182.

[11]Cates v. Allen, 149 U. S. 451; S 13:883; L 37:804.

[12]Bank v. Turnbull, 16 Wall. 190; L 21:296; Sewing Machine Cos.' Case, 18 Wall. 553; L 21:914; Vannevar v. Bryant, 21 Wall. 41; L 22:476; Barrow v. Hunton, 99 U. S. 80; L 25:407; American Bible Soc'y v. Price, 110 U. S. 61; S 3:440; L 28:70; Mutual Reserve Ass'n v. Phelps, 190 U. S. 147; S 23:707; L 47:987; Arkansas v. Kansas & Tex. Coal Co., 183 U. S. 185; S 22:47; L 46:144.

but being within State Exclusiveness for initial suit);[13] by the requirement, for Removal, of the same (and with the same definition of) solidarity of diverse citizenship (as among plaintiffs and as among defendants) that is required for the Federal initial Jurisdiction by diversity of citizenship;[14] by non-Removability, in general, of an issue not capable of being dealt with by the particular District Court in question in a manner binding upon all parties concerned;[15] by non-Removability of suit by a State, where diversity of citizenship is the only ground of Removal (a State not being a citizen);[16] and by immateriality of citizenship of a mere Intervenor.[17]

§ 723. "Jurisdiction".

The term "jurisdiction", in the general Removal text now in question, is here employed, not in the restricted sense[18] of Jurisdiction of a District Court as a Court of the United States, but in the general Common Law sense.[19]

§ 724. Class or Type of State Court.

The class or type of a State Court in question is immaterial.[20]

§ 725. Relation between (a) Jurisdiction of the State Court, and (b) Federal Removal Jurisdiction:—Valid State Jurisdiction as Essential: (a) to Federal Removal-Jurisdiction of the Merits; but not (b) to Federal Removal-Jurisdiction of the Question of State Jurisdiction.

1. Where the Removal texts—in one or in another form of words,[21] refer to a suit, or issue, as pending (for Removal

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[13]See Ancillary Suit, (§§ 584, 722).

[14]Myers v. Swann, 107 U. S. 546; S 2:685; L 27:583; Hanrick v. Hanrick, 153 U. S. 192; S 14:835; L 38:685 (dealing with exceptional Removal, but pertinent here, a fortiori).

[15]Bellaire v. Baltimore & O. R. R., 146 U. S. 117; S 13:16; L 36:910.

[16]Title Guaranty Co. v. Allen, 240 U. S. 136; S 36:345; L 60:566.

[17]Cable v. Ellis, 110 U. S. 389; S 4:85; L 28:186; Torrence v. Shedd, 144 U. S. 527; S 12:726; L 36:528. See § 737.

[18]§ 830.

[19]I. e., to include jurisdiction whether as fixed by Federal law proper, or by principles of general law. Cases, generally, cited in this Chapter.

[20]Thus, a Common Law or Equity issue may be Removed from a State Probate Court, as a "separable controversy". (§§ 772-776).

[21]"Pending", "brought", "commenced".

purposes) in a State Court, they mean: "as pending"; "in so far as pending"; and thus include the sense "colorably pending".[22] As a corollary, the Federal Removal Jurisdiction is measured in and by terms of the jurisdiction of the State Court: in the sense that it extends only to the extent of the jurisdiction—actual or merely colorable—of the State Court. If, in a particular instance, the State Court has mere color (but not reality) of jurisdiction, then, and in such case, the Federal Removal jurisdiction is limited to the question of jurisdiction of the State Court; and thereby to duty and power of dismissal, with finality, as between the parties, for lack of jurisdiction in the State Court.[23]

That is to say—the Federal Court takes over to itself, (in such case), by Removal, the power and duty vested in the State Court; namely, that of dismissal of the suit; and takes over nothing else.[24]

The question (thus Removed) of jurisdiction of the State Court may, of course, be a question of law; or a question of fact; or a question of mixed law and fact.[25]

2. From the standpoint of Merits, the general principle is very commonly presented in the expression: that jurisdiction in the State Court is essential to Removal: meaning, however, simply that State jurisdiction of the Merits is essential to effectual Removal of the Merits.[26]

§ 726. Removability as of What Period or Stage.

The conditions warranting Removal:

1] Must have existed at the commencement of the suit in the State Court;[27]

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[22]Cases cited below.

[23]Goldey v. Morning News, 156 U. S. 518; S 15:559; L 39:517; Conley v. Mathieson Works, 190 U. S. 406; S 23:728; L 47:1113; Geer v. Mathieson Works, 190 U. S. 428; S 23:807; L 47:1122; Remington v. Central Pac. R. R., 198 U. S. 95; S 25:577; L 49: 959; Mechanical Appliance Co. v. Castleman, 215 U. S. 437; S 30: 125; L 54:272; Davis v. Cleveland, Cinn. etc. Ry., 217 U. S. 157; S 30:463; L 54:708.

[24]As matter of Procedure, a Removing party may Remove generally. In such case, the Federal Court passes first on the question of jurisdiction of the State Court; and, if sustaining that jurisdiction (and its own jurisdiction), proceeds upon the Merits. Cases above cited.

[25]Cases above cited. [26]Cases above cited.

[27]Thus, where, by counter-claim, pleaded in a State Court, the original plaintiff there becomes, pro tanto, a defendant, Removal does

2] Must have continued up to the initiation of Removal Procedure;[28] and

3] Must still continue, thereafter, both in the State Court, (pending a controversy over Removal right),[29] and in the District Court, (after effectual assumption of jurisdiction by that court);[30] and, in the latter situation, up to a point, (typically, that of trial in the District Court), beyond which it would be harsh and impracticable to carry out and to enforce this principle.[31]

§ 727. Procedure of, and Incidental to, Removal.

1. In so far as right of Removal, in a particular case, turns upon an issue (of law or of fact) not within the field of Federal Question, such issue is for the State Courts.[32]

2. Procedure of Removal, as initiated in the State Court, is provisional, and depends, for ultimate operativeness, upon completion to, and in, the Federal Court.[33]

3. Subject to the principles above stated, a Removal petition, on its face well-founded, operates immediately to vest in the Federal Court, (subject to Remand by that

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not lie in his favor upon the controversy thus raised, even if he becomes non-suit upon his own claim. West v. Aurora City, 6 Wall. 139; L 18:819.

[28]Gibson v. Bruce, 108 U. S. 561; S 2:873; L 27:825; Chesapeake & O. Ry. v. Dixon, 179 U. S. 131; S 21:67; L 45:121; Texas & Pac. Ry. v. Eastin, 214 U. S. 153; S 29:564; L 53:946.

[29]A defendant in a State Court, having right of Removal, waives such right, by bringing in a new defendant, and by seeking and obtaining relief against the latter, in diminution of a judgment against the original defendant, or by pleading a counter-claim. Texas & Pac. Ry. v. Eastin, cited above.

[30]Thus, discontinuance, by the plaintiff, (after effectual Removal) as against a defendant whose presence was essential to the Removal jurisdiction, is fatal to continuance of the Federal Removal jurisdiction, and requires Federal Remand to the State Court. Texas Transp'n Co. v. Seeligson, 122 U. S. 519; S 7:1261; L 30:1150.

[31]As to operation, in the field here in question, of Waiver or Estoppel, see under those heads (§§ 782-784).

[32]Illinois Centr. R. R. v. Sheegog, 215 U. S. 308; S 30:101; L 54:208; Cincinnati etc. Ry. v. Slade, 216 U. S. 78; S 30:230; L 54:390.

[33]Stevens v. Nichols, 130 U. S. 230; S 9:518; L 32:914; Crehore v. Ohio etc. Ry., 131 U. S. 240; S 9:692; L 33:144; Jackson v. Allen, 132 U. S. 27; S 10:9; L 33:249; In re Winn, 213 U. S. 458; S 29:515; L 53:873.

Court), jurisdiction in respect of issues of fact material to Removal-right.[34]

4. A Removal petition, not on its face well-founded, has, in absence of assumption of jurisdiction by the Federal Court, no operation upon the jurisdiction of the State Court.[35]

5. If, however, in such case, the District Court (wrongfully) assumes jurisdiction, the State Court is bound thereby, until Federal reversal of the District Court's action.[36]

6. Except, however, to such provisional extent, Federal jurisdiction assumed without right thereto, (and apart from Waiver or Estoppel),[37] is null and void, in the strict sense.[38]

7. After Removal Procedure, (effectual, in law, but not recognized by the State Court), the Removing party may, under protest, defend his rights (upon jurisdiction, and upon the Merits), in the State Court, without waiver of the Removal.[39]

8. Right of Removal involves, as an Incident, right of such action in the State Court as is necessary or convenient for effectuation of Removal.[40]

9. Where (exceptionally) the Removal texts predicate Removal as before trial, (rather than as of an earlier

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[34]Stone v. South Carolina, 117 U. S. 430; S 6:799; L 29:962; Carson v. Hyatt, 118 U. S. 279; S 6:1050; L 30:167; Burlington etc. Ry. v. Dunn, 122 U. S. 513; S 7:1262; L 30:1159.

[35]Thorn Wire Hedge Co. v. Fuller, 122 U. S. 535; S 7:1265; L 30:1235; Iowa Centr. Ry. v. Bacon, 236 U. S. 305; S 35:357; L 59:591.

[36]Dowell v. Applegate, 152 U. S. 327; S 14:611; L 38:463; Chesapeake & O. Ry. v. McCabe, 213 U. S. 207; S 29:430; L 53:765.

[37]§§ 782-784.

[38]Florida Centr. R. R. v. Bell, 176 U. S. 321; S 20:399; L 44:486; North American Transp'n Co. v. Morrison, 178 U. S. 262; S 20:869; L 44:1061.

[39]Missouri Pac. Ry. v. Fitzgerald, 160 U. S. 556; S 16:389; L 40:536.

[40]As, special appearance for objection to the State Court's jurisdiction, without waiver of Removal right, non obstante State law textually to the contrary. Goldey v. Morning News, 156 U. S. 518; S 15:559; L 39:517; Commercial Mutual Acc. Co. v. Davis, 213 U. S. 245; S 29:445; L 53:782; Davis v. Cleveland, Cinn. etc. Ry., 217 U. S. 157; S 30:463; L 54:708. See §§ 661-663.

period), the first of a possible succession of trials is intended.[41]

10. A suit effectually Removed is, in general, Removed as of its standing in the State Court immediately preceding the filing of the Removal petition; and with its Incidents then existing;[42] provided the features in question are consonant with fundamental principles of Federal Procedure.[43]

11. Where the Federal Court has wrongfully assumed jurisdiction, it is under the duty of making Remand to the State Court.[44]

12. An order of Remand is not subject to Appeal or Error,[45] but is subject to review by Mandamus.[46]

§ 728. Counter-Claim As, or As Not, Operative for Removal.

By estoppel of the plaintiff (through yielding without objection to de facto Removal by the defendant) a counter-

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[41]Bible Soc'y v. Grove, 101 U. S. 610; L 25:847; McDonnell v. Jordan, 178 U. S. 229; S 20:886; L 44:1048.

[42]E. g., a counter-claim theretofore pleaded (Mackay v. Uinta Development Co., 229 U. S. 173; S 33:638; L 57:1138); an attachment upon mesne process (Clark v. Wells, 203 U. S. 164; S 27:43; L 51:138); an Injunction bond (Russell v. Farley, 105 U. S. 433, 437; L 26:1060: "The injunction bond taken" * * *). See Jud. Code, §§ 36, 38.

[43]Thus, a pleading, in a State Court, in a Common Law action, of an Equitable defence, did not, prior to the recent change in Federal Procedure in that regard (see Equitable Defence at Law) survive Removal. Northern Pac. R. R. v. Paine, 119 U. S. 561; S 7:323; L 30:513. (In this instance, the pleading, while not surviving as pleading, was operative as an admission of record—the defendant having neglected to have it struck from the record).

[44]Even after having mistakenly heard the case and entered judgment for the plaintiff (North American Transp'n Co. v. Morrison, 178 U. S. 262; S 20:869; L 44:1061); the colorable judgment being null (case cited). See Remand, and cases cited.

[45]Jud. Code, § 28:—

> * * * Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: * * *

See our § 824.

[46]§ 816.

claim (making up jurisdictional amount otherwise lacking) may, if in character and amount inherently within the Federal jurisdiction, operate ultimately to validate the Removal.[47]

§ 729. Separable Controversy.[48]

Illustration of the use of the term "separable controversy" may be presented: (1) by an example of separable controversy;[49] (2) by examples of controversy not separable.[50]

§ 730. Exceptional Removal:—Civil Causes.[51]

1. Removal of Civil causes is, in certain exceptional situations, given exceptional breadth, and breadth greater than that of initial Federal Jurisdiction.

2. In a considerable degree, the broadening is mere matter of pleading: that is to say, it gives effect, for purposes of Removal, not only to the plaintiff's pleading, but also to the pleading of the defendant.[52]

3. Where, or in so far as, the broadening is not mere matter of pleading, it is, in general, a broadening (for Re-

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[47]Mackay v. Uinta Development Co., 229 U. S. 173; S 33:638; L 57:1138. See citation of the case, § 783, par. 1.

[48]As to "suit", "controversy", "case", "proceeding", etc., and "issue", as interchangeable variants, see §§ 580-584.

[49]Where, pursuant to a State statute of Extension (§§ 554-557) of Equity Procedure, a junior mortgagee brought suit to foreclose, and joined the senior mortgagee as a co-defendant with the mortgagor; and the mortgagor and the junior defendant both severally challenged the senior mortgagee, there existed a separable controversy between the mortgagee and the plaintiff on one side, and the senior mortgagee on the other side. Fritzlen v. Boatmen's Bank, 212 U. S. 364; S 29:366; L 53:551.

[50]Plymouth Mining Co. v. Amador Canal Co., 118 U. S. 264; S 6:1034; L 30:232; Chicago, Rock Isl. & Pac. R. R. v. Martin, 178 U. S. 245; S 20:854; L 44:1055: (mere separate answers, in a tort joint under State law, and alleged as joint, do not present separable controversies).

See also Fidelity Ins. Co. v. Huntington, 117 U. S. 280; S 6:733; L 29:898; Core v. Vinal, 117 U. S. 347; S 6:767; L 29:912; Graves v. Corbin, 132 U. S. 571; S 10:196; L 33:462; Brown v. Trousdale, 138 U. S. 389; S 11:308; L 34:987.

[51]For Congressional texts of more general character covering both Civil and Criminal Removal, see our § 714.

For other Congressional texts, see Jud. Code, §§ 30-33.

[52]See the texts above referred to.

moval) of the field of Federal Question as in general[53] defined.[54]

4. In respect of such exceptional Removal-right, pertinent principles of general Removal are, in general, operative: as, in respect of requirement, in general, of diversity of citizenship,[55] and of unity of action in Removal Procedure.[56]

5. Certain of those principles are, however, in some situations, departed from.[57]

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[53]See Federal Question.

[54]See the texts above referred to.

[55]Jefferson v. Driver, 117 U. S. 272; S 6:729; L 29:897; Cambria Iron Co. v. Ashburn, 118 U. S. 54; S 6:929; L 30:60; Hancock v. Holbrook, 119 U. S. 586; S 7:341; L 30:538; Cochran v. Montgomery County, 199 U. S. 260; S 26:58; L 50:182.

[56]Myers v. Swann, 107 U. S. 546; S 2:685; L 27:583; Hanrick v. Hanrick, 153 U. S. 192; S 14:835; L 38:685.

[57]E. g., in provision for Removal by a plaintiff, in land-grant suit, (Jud. Code, § 30); and in non-requirement, in certain situations, of solidarity of action within a party-group (Jud. Code, §§ 30-33).

CHAPTER CXXXVI.

Disqualification of Assignee, Endorsee, or Bearer, As Plaintiff In An Intra-State District Court.[1]

§ 731. Prefatory:—Intent and Aim of the Enactment.

Such plaintiffs as are, by the text in question, disqualified for the Federal intra-State Common Law or Equity Jurisdiction, are so disqualified, not as matter of Congressional policy adverse to such plaintiffs, as such, but pursuant to a two-fold purpose of:

(1) Prevention, in the classes of situation dealt with by the text, of transfer and acquisition (in itself bona fide and valid in pais)[2] of choses in action, for the purpose of creating Federal (as against State) Jurisdiction: that is to say, prevention of trading in Federal Jurisdiction.

(2) Removal of opportunity of creation in pais of pretended, fictitious, and merely colorable Federal Jurisdictional situations: that is to say, removal of opportunity of perpetrating frauds upon the Federal Jurisdiction.[3]

The adverse operation, to a certain extent, upon certain situations, (of the former of these two classes), not within the primary aim of the Enactment, is a mere incident, necessary to the effectual carrying out of such primary aim: (a result constantly necessary, and very frequent, in Inhibitory legislation based upon Public Policy).

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[1]Jud. Code, § 24, ¶ First:—

No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made.

[2]Such as is considered in the section cited above.

[3]Bank of the United States v. Planters' Bank, 9 Wh. 904, 909; L 6:244; Brown v. Fletcher, 235 U. S. 589, 595; S 35:154; L 59:374.

§ 732. Certain Typical Situations Not Within the Terms of the Text Cited.

Before considering (in a succeeding section) the question of Interpretation proper, of the text, (that is to say, narrowing or expansion by Interpretation, pure and simple, of the language of the text in question), we may conveniently consider certain typical situations, superficially (but only superficially) within the language of the text. Such situations may be presented as follows:—

(1) Novation and the Like.—As matter of definition of its terms, the inhibition of the text does not extend to a situation arising by novation or the like: since the plaintiff, in such case, sues, not as assignee or transferee of (and upon) the original promise, but as promisee under (and upon) the new promise.[4]

(2) The Situation of No Cause of Action in the Transferor.—The text in question is, as matter of definition of its terms, limited to the situation of a chose in action actually (and not merely in form) existing, in favor of the transferor, at the time of the assignment: that is to say, the situation in which the transferor has, existing in himself, a cause of action, to transfer.[5]

(3) Merger in a Judgment.—If a chose in action, in character within the inhibition of the text in question, is transferred; and the transferee reduces his claim to judgment, in some competent Court, the original cause of action is, under general principles, merged in the judgment, (in favor of the transferee), and the text in question (as matter of definition of its terms by general law), does not extend to the judgment creditor, suing upon his judgment.[6]

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[4]Superior City v. Ripley, 138 U. S. 93; S 11:288; L 34:914; New Orleans v. Quinlan, 173 U. S. 191; S 19:329; L 43:664; American Colortype Co. v. Continental Co., 188 U. S. 104; S 23:265; L 47:404.

[5]Thus, where the maker of a negotiable note is a mere accommodation maker, as between him and the payee, and the latter endorses the note before maturity, for value, and without notice, the endorsee is not within the terms of the inhibition of the text. Holmes v. Goldsmith, 147 U. S. 150; S 13:288; L 37:118.

So, where a municipal corporation, as mere matter of business convenience, makes its notes payable to the order of its own Treasurer, and he endorses them to purchasers. Blair v. Chicago, 201 U. S. 400; S 26:427; L 50:801.

[6]Ober v. Gallagher, 93 U. S. 199; L 23:829.

(4) ISSUES INCIDENTALLY ARISING IN THE PROGRESS OF THE CAUSE.—As matter of general Federal law (and not of Interpretation of the particular text in question) the text deals only with the issues initially presented as a ground of Federal jurisdiction, and not with issues newly and incidentally arising in the progress of the cause:[7] this proposition being not matter of Interpretation of the particular text in question, but a mere application of a general principle of Unwritten Federal law, tacitly adopted from the Common Law.[8]

§ 733. Interpretation Proper, of the Text in Question.

Interpretation proper of the text in question may be presented as follows:—

(1) INTERPRETATION FURTHERING, OR EXPANSIVE OF, THE LETTER OF THE TEXT.—The text extends to the case of a note or bond secured by mortgage, from the standpoint of foreclosure suit;[9] to municipal bonds payable to bearer;[10] to a contract for re-conveyance of land, creating, in effect, a mortgage;[11] to contracts of sale and purchase of land, generally;[12] to assignments of judgments;[13] and to assignment effected in and by Judicial sale.[14]

(2) INTERPRETATION LIMITATIVE OF THE LETTER OF THE TEXT.—The inhibition of the text does not extend to ordinary dealings between co-owners of land.[15]

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[7]As, by Amendment. Ober v. Gallagher, cited above.

[8]See Collateral Issues (§§ 575, 576).

[9]Sheldon v. Sill, 8 How. 441; L 12:1147; Kolze v. Hoadley, 200 U. S. 76; S 26:220; L 50:377.

[10]Ackley School District v. Hall, 113 U. S. 135; S 5:371; L 28:954; New Providence v. Halsey, 117 U. S. 336; S 6:764; L 29:904.

[11]Shoecraft v. Bloxham, 124 U. S. 730; S 8:686; L 31:574.

[12]Plant Investment Co. v. Key West Ry., 152 U. S. 71; S 14:483; L 38:358.

[13]Metcalf v. Watertown, 128 U. S. 586; S 9:173; L 32:543; Mississippi Mills v. Cohn, 150 U. S. 202; S 14:75; L 37:1052.

[14]Sere v. Pitot, 6 Cr. 332; L 3:240; Glass v. Concordia Parish, 176 U. S. 207; S 20:346; L 44:436: (it being possible, through such transfer, to defeat one or the other of the primary aims of the text in question). See, also, Brown v. Fletcher, 235 U. S. 589, 596, 597; S 35:154; L 59:374.

[15]As, an assignment by one to the other, of a claim for tortious cutting and removal of standing timber. Ambler v. Eppinger, 137 U. S. 480; S 11:173; L 34:765.

The fact that a negotiable instrument is overdue when transferred, does not, in and of itself, bring the transfer within the inhibition, if it is not otherwise within it.[16]

The text in question does not extend to suits for the recovery of a particular thing, corporeal or incorporeal.[17]

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[16]Cross v. Allen, 141 U. S. 528; S 12:67; L 35:843.

[17]As, a share (in a trust estate) transferred by the beneficiary to the plaintiff. Brown v. Fletcher, cited above.

CHAPTER CXXXVII.

PARTIES.[1]

§ 734. Classification as Plaintiff or Defendant:—Alignment.

For the purpose of the Federal Jurisdiction now in question, the Federal law classifies individuals—parties to a suit or issue—according to its own view, and according to substance, not form. Thus, for the purposes of diversity of citizenship, the Federal law classifies parties as plaintiffs or as defendants, according to actual community, or actual conflict, of interests.[2]

Thus, in an Eminent Domain compensation proceeding, the property-owner is Federally classified as a defendant, within the meaning of that term in the Federal Removal legislation, and may, as such, make Removal, even when the taking was under State law and the State statutes characterize him as a plaintiff.[3]

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[1]As to general principles concerning Parties, Privies, Intervenors, etc., see §§ 592-607.

As to a Sovereign as a Party, see §§ 609-619.

As to national banks and Federally incorporated railroads, see § 682, ¶ 9.

[2]Removal Cases, 100 U. S. 457; L 25:593; Detroit v. Dean, 106 U. S. 537; S 1:500; L 27:300; Dawson v. Columbia Trust Co., 197 U. S. 178; S 25:420; L 49:713; Steele v. Culver, 211 U. S. 26; S 29:9; L 53:74.

The question of such alignment commonly arises in Equity suits (cases cited above); but it may arise at law. Mason City R. R. v. Boynton, 204 U. S. 570; S 27:321; L 51:629; Mackay v. Uinta Development Co., 229 U. S. 173, 176, ad fin.; S 33:638; L 57:1138.

Cases in which the record alignment was considered, and was held to be coincident with proper alignment from the standpoint of citizenship, are: Harter v. Kernochan, 103 U. S. 562; L 26:411; Myers v. Swann, 107 U. S. 546; S 2:685; L 27:583; New Jersey Centr. R. R. v. Mills, 113 U. S. 249; S 5:456; L 28:949; East Tennessee etc. R. R. v. Grayson, 119 U. S. 240; S 7:190; L 30:382; Doctor v. Harrington, 196 U. S. 579; S 25:355; L 49:606; Chicago v. Mills, 204 U. S. 321; S 27:286; L 51:504; Venner v. Great Northern Ry., 209 U. S. 24; S 28:328; L 52:666; Helm v. Zarecor, 222 U. S. 32; S 32:10; L 56:77.

[3]Mason City R. R. v. Boynton, cited above.

§ 735. Nominal or Titular Parties.

Where one having no personal interest in and no power or responsibility concerning the matter in controversy, is, nevertheless, necessarily or properly a plaintiff or a defendant, his citizenship is disregarded.[4]

§ 736. Definition of Party as between a Tutelary Person and the Beneficiary.

Where there are, on the same side, a tutelary person and his beneficiary, the question arises whether—for the purposes of diversity of citizenship—it is the citizenship of the former or of the latter that is regarded. The question is, in strictness, a question not of Federal Procedure law, but of Substantive law: that is to say, of the law defining the tutelary status. Thus, where the tutelary party is an executor or administrator, of the ordinary Common Law status and title, it is his citizenship, and his alone, that is regarded.[5]

§ 737. Subsidiary Parties.

For the purposes of diversity of citizenship, subsidiary parties are disregarded: as, a garnishee,[6] or an intervenor;[7]

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[4]Walden v. Skinner, 101 U. S. 577; L 25:963; (executor of a deceased trustee, made a defendant solely to effect a release of the mere legal title of the decedent: the executor having power, by State law, to make such release).

So, of the mere titular obligee in a public or quasi-public official bond, in a suit thereon by a beneficiary, in the name of the titular obligee. Browne v. Strode, 5 Cr. 303; L 3:108; McNutt v. Bland, 2 How. 90; L 11:159.

For illustrative cases in which one was held not to be a mere nominal party, see Myers v. Swann, 107 U. S. 546; S 2:685; L 27:583; Wilson v. Oswego, 151 U. S. 56; S 14:259; L 38:70; Sharpe v. Bonham, 224 U. S. 241; S 32:420; L 56:747.

[5]Amory v. Amory, 95 U. S. 186; L 24:428; Hess v. Reynolds, 113 U. S. 73; S 5:377; L 28:927; Clark v. Bever, 139 U. S. 96; S 11:468; L 35:88; Bristol v. Washington County, 177 U. S. 133; S 20:585; L 44:701.

So, of a guardian, having, by the local Substantive law, like status and title. Mexican Centr. Ry. v. Eckman, 187 U. S. 429; S 23:211; L 47:245.

[6]Bacon v. Rives, 106 U. S. 99; S 1:3; L 27:69.

[7]Cable v. Ellis, 110 U. S. 389; S 4:85; L 28:186; Torrence v. Shedd, 144 U. S. 527; S 12:726; L 36:528; Rouse v. Letcher, 156 U. S. 47; S 15:266; L 39:341; Gregory v. Van Ee, 160 U. S. 643; S 16:431; L 40:566; Carey v. Houston & Tex. Centr. Ry., 161 U. S.

or a new party coming in, as plaintiff or as defendant; or as in the case of unknown parties conventionally made defendants in a proceeding in rem (as, in a title-clearing suit, under a familiar form of State statute).[8]

Mere pecuniary irresponsibility does not class an individual party as subsidiary.[9]

§ 738. Solidarity of Parties.

The text of the Judicial Code—following preceding Judiciary legislation—speaks, in general, in the singular, of plaintiff and defendant. In case of a plurality of plaintiffs or of defendants, the singular term means, in general, the body of plaintiffs or of defendants: with the corollary of requirement of solidarity as among members of either side, in respect of Federal Jurisdictional qualifications. Thus, where diversity of citizenship is essential, it must exist between each plaintiff and each defendant.[10]

So, a Venue text, providing for venue in the District of the plaintiff, meant a District common to all the plaintiffs, and thereby dealt with a body of plaintiffs all of one District.[11]

The principle above considered—in so far as it deals with diversity of citizenship as ground of Federal Jurisdiction—does not (it will be observed) require identity of State citizenship within a party-group; but requires merely solidarity in diversity of citizenship; and that may exist as between the body of plaintiffs and the body of defend-

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115; S 16:537; L 40:638; Rouse v. Hornsby, 161 U. S. 588; S 16:610; L 40:817; Pope v. Louisville, New Alb. etc. Ry., 173 U. S. 573; S 19:500; L 43:814; St. Louis, Ks. City etc. R. R. v. Wabash R. R., 217 U. S. 247, 250; S 30:476; L 54:698; Shulthis v. McDougal, 225 U. S. 561; S 32:704; L 56:1205.

[8]As Federally enforced under Jud. Code, § 57. See our § 741.

[9]Steele v. Culver, 211 U. S. 26, 29; S 29:9; L 53:74.

[10]Strawbridge v. Curtiss, 3 Cr. 267; L 2:435; Sewing Machine Cos.' Case, 18 Wall. 553; L 21:914; Vannevar v. Bryant, 21 Wall. 41; L 22:476; American Bible Soc'y v. Price, 110 U. S. 61; S 3:440; L 28:70; Hanrick v. Hanrick, 153 U. S. 192; S 14:835; L 38:685; Hooe v. Jamieson, 166 U. S. 395; S 17:596; L 41:1049; Florida Centr. R. R. v. Bell, 176 U. S. 321; S 20:399; L 44:486; Cochran v. Montgomery County, 199 U. S. 260; S 26:58; L 50:182; Alabama Southern Ry. v. Thompson, 200 U. S. 206; S 26:161; L 50:441.

[11]Smith v. Lyon, 133 U. S. 315; S 10:303; L 33:635.

ants, even though there be diversity of State citizenship as among plaintiffs and among defendants.[12]

§ 739. Solidarity, in General, in Action.

A group of plaintiffs or a group of defendants must, in general, act as a unit, in a field of action affecting Federal Jurisdiction: as, in electing to sue in a Federal, rather than in a State Court; or in electing to enforce Removal.[13]

Certain exceptional Removal texts, however, depart from this principle.[14]

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[12]Sweeney v. Carter Oil Co., 199 U. S. 252; S 26:55; L 50:178.

[13]Louisville & Nashv. R. R. v. Ide, 114 U. S. 52; S 5:735; L 29:63; Pirie v. Tvedt, 115 U. S. 41; S 5:1034; L 29:331; Sloane v. Anderson, 117 U. S. 275; S 6:730; L 29:899; Plymouth Mining Co. v. Amador Canal Co., 118 U. S. 264; S 6:1034; L 30:232; Louisville & Nashv. R. R. v. Wangelin, 132 U. S. 599; S 10:203; L 33:474; Alabama Southern Ry. v. Thompson, 200 U. S. 206; S 26:161; L 50:441; Cincinnati & Tex. Pac. Ry. v. Bohon, 200 U. S. 221; S 26:166; L 50:448.

[14]§ 730.

CHAPTER CXXXVIII.

VENUE.

§ 740. The General Venue Texts.

The general Venue texts dealing (or in so far as dealing) with the subject-matter of the present Part, are not Jurisdictional in the strict sense; but look solely to the convenience of parties, and are broadly and freely open to Waiver or Estoppel,[1] even in favor of a neutral District,[2] (a situation not textually dealt with by the Judicial Code).[3]

§ 741. Proceedings in Rem; Title-Clearing.

In respect of suits in Rem, and title-clearing,[4] an exceptional situation, entirely different, in principle, and from a practical point of view, is presented. We need only allude to the consideration: that, for convenience of subsequent inquiry into title, the record of the judgment should be in the locality in which the property in question is. In the case of such suits, therefore, the textually prescribed venue is, by provision of the text, Jurisdictional in the

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[1]Jones v. Andrews, 10 Wall. 327; L 19:935; St. Louis & San Fr. Ry. v. McBride, 141 U. S. 127; S 11:982; L 35:659; Western Loan Co. v. Butte & Boston Min'g Co., 210 U. S. 368; S 28:720; L 52:1101; In re Moore, 209 U. S. 490; S 28:585; L 52:904; Kreigh v. Westinghouse & Co., 214 U. S. 249; S 29:619; L 53:984; see Merchants' Heat etc. Co. v. Clow, 204 U. S. 286; S 27:285; L 51:488; (waiver by presenting a counter-claim).

[2]In re Moore; Western Loan Co. v. Butte & Boston Min'g Co.; Kreigh v. Westinghouse & Co., all cited above: (negativing remarks to the contrary in Ex parte Wisner, 203 U. S. 449; S 27:150; L 51:264).

[3]See, generally, Waiver and Estoppel, §§ 782-784.

[4]Jud. Code, § 57:—

> When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, * * *

strict sense; and the suit is inherently not capable of being entertained in any other venue.[5]

The text in question extends to a suit by shareholders of a corporation, against the corporation and others, for cancellation of deeds and leases,—to which the corporation is a party—of property within the District of suit;[6] to vendor's lien upon land;[7] to clearing of title to shares of stock in a local corporation;[8] and to lien—under contract—for legal services.[9]

It extends to remedy incidental to the issue primarily presented.[10]

It does not extend to a suit dealing only incidentally and collaterally with title.[11]

§ 742. In Case of Joinder of Different Causes of Action.

Where, in a suit, different causes of action are (properly, from the standpoint of pleading) joined, the Venue provisions may apply to certain, and not to certain other, of such causes of action. Thus, when a bill in Equity was based in part upon the Patent laws, but in part upon causes of action of general, (as, of contractual), character, and the defendant was entitled, in respect of causes of action of the latter class, to venue in a District other than that of suit, the bill was maintainable as against the defendant, (its right to such other venue being insisted upon), only in respect of the Patent cause of action.[12]

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[5]Cases cited below.

[6]Mellen v. Moline Iron Works, 131 U. S. 352; S 9:781; L 33:178; Citizens Savings etc. Co. v. Illinois Centr. R. R., 205 U. S. 46; S 27: 425; L 51:703; Schultz v. Diehl, 217 U. S. 594; S 30:694; L 54: 896.

[7]Ober v. Gallagher, 93 U. S. 199; L 23:829.

[8]Jellenik v. Huron Copper Co., 177 U. S. 1; S 20:559; L 44:647.

[9]Ingersoll v. Coram, 211 U. S. 335; S 29:92; L 53:208.

[10]Thus, a bill praying (a) for removal of a cloud from the title of land, and (b) for partition of the land, is within the text in question. Greeley v. Lowe, 155 U. S. 58; S 15:24; L 39:69. See Collateral Issues (§§ 575, 576).

[11]E. g., a suit for abatement of a nuisance consisting in a certain use of a parcel of land. Ladew v. Tennessee Copper Co., 218 U. S. 357; S 31:81; L 54:1069.

[12]Geneva Furniture Co. v. Karpen, 238 U. S. 254; S 35:788; L 59:1295.

§ 743. **Exceptional Venue Under the Sherman Act.**

For suits by the United States, under the Sherman Act, an exception is made to the general rules of Venue.[13]

§ 744. **Other Venue Texts.**

In the absence of specific authority, we may assume that other exceptional Venue texts fall within the principle of the former, or of the latter, of the two preceding sections, according to the reason of the thing.[14]

§ 745. **Right of Challenge of Venue.**

Right of challenge of wrong venue—even when the defect is capable of Waiver—is absolute.[15]

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[13]Standard Oil Co. v. United States, 221 U. S. 1; S 31:502; L 55:619.

[14]We may mention the proposition that the Common Law and Equity Venue texts in question do not extend to the Admiralty Jurisdiction, even for suit in personam. In re Louisville Underwriters, 134 U. S. 488; S 10:587; L 33:991.

[15]E. g., it cannot be qualified by a District Court, by a Rule of Court. Davidson Marble Co. v. Gibson, 213 U. S. 10; S 29:324; L 53:675.

CHAPTER CXXXIX.

FEDERAL ADOPTION OF STATE COMMON LAW PROCEDURE.[1]

§ 746. Breadth of Judicial Discretion.

The text cited leaves with the Courts a broad discretion. Thus, while the text cited is, in a general sense, prospective in operation, and contemplates State Procedure as it may be, from time to time,[2] yet the District Courts are not bound to follow changes in State law, but may, by Rule, disregard such changes.[3]

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[1]Rev. Stats. §§ 914, 915, 916:—

§ 914. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

§ 915. In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process: Provided, That similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy.

§ 916. The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

[2]Cases, generally, cited in this Chapter.

[3]Shepard v. Adams, 168 U. S. 618; S 18:214; L 42:602; Boston & Maine R. R. v. Gokey, 210 U. S. 155; S 28:657; L 52:1002.

§ 747. **Affirmative Aspect of the Text.**

Subject to qualifications considered below, the text in question is of broad scope.

It extends, (subject to specific Congressional text) :[4]

1] To suit by an assignee of a chose in action, in his own name;[5]

2] To State annulment, from the standpoint of State Procedure, of the Common Law doctrine of invalidity of a conveyance of land by one out of possession;[6]

3] To suit by or against a representative member of a group;[7]

4] To suit on an unmatured liquidated claim;[8]

5] To requirement of mere presentation of a claim to a State Probate Court, as a condition-precedent of a suit upon it against the personal representative of a decedent;[9]

6] To requirement of affirmative demand of Civil jury trial;[10]

7] To necessity or privilege of two suits, or two trials, in Ejectment;[11]

8] To survival of tort, upon death of the original plaintiff;[12]

9] To payment by the defendant, into a bank, for the plaintiff, of the amount of a liquidated claim in suit; and termination, thereby, of the suit;[13]

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[4]As, that of Jud. Code, § 24, ¶ First (see our §§ 731-733).

[5]Harper v. Butler, 2 Pet. 239; L 7:410.

[6]Roberts v. Cooper, 20 How. 467; L 15:969.

[7]Thomas v. Trustees, 195 U. S. 207; S 25:24; L 49:160; Adams Ex. Co. v. New York, 232 U. S. 14; S 34:203; L 58:483.

[8]Schunk v. Moline Co., 147 U. S. 500; S 13:416; L 37:255; (see p. 506, last par.).

[9]McGill v. Armour, 11 How. 142; L 13:638.

[10]United States v. King, 7 How. 833; L 12:934.

[11]Equator Co. v. Hall, 106 U. S. 86; S 1:128; L 27:114; Gibson v. Lyon, 115 U. S. 439; S 6:129; L 29:440; Smale v. Mitchell, 143 U. S. 99; S 12:353; L 36:90; Balkam v. Woodstock Iron Co., 154 U. S. 177; S 14:1010; L 38:953; Barber v. Pittsburgh etc. Ry., 166 U. S. 83; S 17:488; L 41:925; (see Capital Traction Co. v. Hof, 174 U. S. 1, 13; S 19:580; L 43:873).

[12]Baltimore & O. R. R. v. Joy, 173 U. S. 226; S 19:387; L 43:677.

[13]California v. San Pablo etc. R. R., 149 U. S. 308; S 13:876; L 37:747.

10] To mode of service upon a foreign corporation doing business within a Federal District in question;[14]

11] To attachment upon mesne process;[15]

12] To the matter of right of Discontinuance, and Incidents thereof;[16]

13] To Arbitration, or Reference, in general;[17]

14] To the matter of Damages, in general;[18]

15] To effectuality of a general verdict, or general finding, if any one count be sufficient to support it;[19]

16] To privilege of several suit (or in a joint suit, of several judgment), upon a joint contract;[20]

17] To Statutes of Limitation,[21] even, in general, in respect of suits peculiarly of Federal concern:[22] including special such Statutes;[23] and including also, indirect operation, in Equity, of such Statutes;[24]

18] To the matter of supplementary proceedings in aid of a judgment;[25]

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[14]Ex parte Schollenberger, 96 U. S. 369; L 24:853; Grossmayer, Pet'r, 177 U. S. 48; S 20:535; L 44:665; Lumbermen's Ins. Co. v. Meyer, 197 U. S. 407; S 25:483; L 49:810; Board of Trade v. Hammond Elev. Co., 198 U. S. 424; S 25:740; L 49:1111; Kendall v. American Automatic Loom Co., 198 U. S. 477; S 25:768; L 49:1133; Commercial Mut. Accident Co. v. Davis, 213 U. S. 245; S 29:445; L 53:782; (the question of the legal effect, in a given instance, of the acts done, as and for service, being, in a given instance, matter of Federal law: Kendall v. Automatic Loom Co., cited above).

[15]Fitzgerald Co. v. Fitzgerald, 137 U. S. 98; S 11:36; L 34:608; (subject to general Federal Venue provision: § 748, ad fin.).

[16]Southern Ry. v. Miller, 217 U. S. 209; S 30:450; L 54:732.

[17]Newcomb v. Wood, 97 U. S. 581; L 24:1085.

[18]Arkansas Cattle Co. v. Mann, 130 U. S. 69; S 9:458; L 32:854; Fidelity & Deposit Co. v. Bucki Co., 189 U. S. 135; S 23:582; L 47:744.

[19]Townsend v. Jemison, 7 How. 706; L 12:880; Bond v. Dustin, 112 U. S. 604; S 5:296; L 28:835.

[20]Sawin v. Kenny, 93 U. S. 289; L 23:926.

[21]Metcalf v. Watertown, 153 U. S. 671; S 14:947; L 38:861; Campbell v. Haverhill, 155 U. S. 610; S 15:217; L 39:280; McClaine v. Rankin, 197 U. S. 154; S 25:410; L 49:702.

[22]Cases last cited.

[23]E. g., in favor of executors or administrators. Security Trust Co. v. Black River Bank, 187 U. S. 211; S 23:52; L 47:147.

[24]Boone County v. Burlington etc. R. R., 139 U. S. 684; S 11:687; L 35:319.

[25]Ex parte Boyd, 105 U. S. 647; L 26:1200; Stevens v. Fuller, 136 U. S. 468; S 10:911; L 34:461; (the supplementary procedure here

19] To creation and continuance of, (and to lapse of non-perfected), judgment liens, and the like;[26] and

20] To the field, in general, of rules of Evidence.[27]

§ 748. Qualifications by General Federal Principles or Policy.

The letter of the text cited above, is, from the nature of the case, qualified and limited in various ways, partly by Federal Organic law; partly by specific Congressional legislation; partly by general Federal policy. Thus, the text does not extend:

1] To particulars of, or dispensation with, jury trial;[28]

2] To the matter of the burden of proof;[29]

3] To procedure of settlement of exceptions, and the like.[30]

4] It does not affect the Federal distinction between Common Law and Equity.[31]

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including potential imprisonment of the judgment debtor upon charges of fraud in the form of waste, or concealment, of assets); Owens v. Henry, 161 U. S. 642; S 16:693; L 40:837.

[26]Williams v. Benedict, 8 How. 107; L 12:1007; Ward v. Chamberlain, 2 Bl. 430; L 17:319.

[27]Connecticut Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250; S 5:119; L 28:708; (confidential communication to physician).

As to potential rendering of verdict on Sunday, at least where the law of the State in question permits that course, see Stone v. United States, 167 U. S. 178; S 17:778; L 42:127.

[28]Paine v. Central Vermont R. R., 118 U. S. 152; S 6:1019; L 30:193; (Judge as "referee"); Nudd v. Burrows, 91 U. S. 426; L 23:286; Vicksburg etc. R. R. v. Putnam, 118 U. S. 545; S 7:1; L 30:257; St. Louis, Iron Mtn. etc. Ry. v. Vickers, 122 U. S. 360; S 7:1216; L 30:1161; Lincoln v. Power, 151 U. S. 436; S 14:387; L 38:224; (charge to jury); McDonald v. Pless, 238 U. S. 264; S 35:783; L 59:1300; (action or conduct of jurors); Indianapolis etc. R. R. v. Horst, 93 U. S. 291; L 23:898; (special findings).

[29]Central Vermont Ry. v. White, 238 U. S. 507; S 35:865; L 59:1433.

[30]Ex parte Bradstreet, 4 Pet. 102; L 7:796; Chateaugay Iron Co., Pet'r, 128 U. S. 544; S 9:150; L 32:508; In re Streep, Pet'r, 156 U. S. 207; S 15:358; L 39:399; Waldron v. Waldron, 156 U. S. 361; S 15:383; L 39:453.

[31]Robinson v. Campbell, 3 Wh. 212; L 4:372; Bagnell v. Broderick, 13 Pet. 436; L 10:235; Fenn v. Holme, 21 How. 481; L 16:198; Langdon v. Sherwood, 124 U. S. 74; S 8:429; L 31:344; Scott v. Armstrong, 146 U. S. 499; S 13:148; L 36:1059; Lindsay v. Shreveport Bank, 156 U. S. 485; S 15:472; L 39:505.

5] It is subject to a general Federal policy of non-recognition of inanimate things as parties, at Common Law or in Equity;[32]

6] To a Federal policy of immunity in general, of Federal Executive governmental instrumentalities from Judicial interruption at private instance.[33]

7] It does not expand or qualify the Federal Venue texts.[34]

8] It does not extend to the matter of right to, or of mode of challenge or of assertion of, Federal Jurisdiction.[35]

§ 749. Accrued Privileges or Benefits.

A change in State Procedure law has no operation adverse to privileges or benefits accrued under earlier (Federally adopted) State Procedure.[36]

§ 750. Limitation to State Law of General Character.

The text in question contemplates only such State Procedure law as is of general character, and does not extend to exceptional local or class provisions.[37]

§ 751. Limitation to Affirmative State Law.

The text in question contemplates only affirmative State law, not absence of State law, in respect of a particular situation.[38]

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[32]Steamboat Burns, 9 Wall. 237, 238, 239; L 19:620.

[33]As, by attachment upon mesne process, in a suit against a national bank. Pacific Bank v. Mixter, 124 U. S. 721; S 8:718; L 31:567; Van Reed v. People's Bank, 198 U. S. 554; S 25:775; L 49:1161.

[34]Toland v. Sprague, 12 Pet. 300; L 9:1093; Chaffee v. Hayward, 20 How. 208; L 15:804; Ex parte Railway, 103 U. S. 794; L 26:461; Laborde v. Ubarri, 214 U. S. 173; S 29:552; L 53:959; Big Vein Coal Co. v. Read, 229 U. S. 31; S 33:694; L 57:1053.

[35]Ex parte Fisk, 113 U. S. 713; S 5:724; L 28:1117; Southern Pac. Co. v. Denton, 146 U. S. 202; S 13:44; L 36:942; Mexican Centr. Ry. v. Pinkney, 149 U. S. 194; S 13:859; L 37:699; Hanks Dental Ass'n v. Tooth Crown Co., 194 U. S. 303; S 24:700; L 48:988; David Lupton's Sons v. Automobile Club of America, 225 U. S. 489; S 32:711; L 56:1177 (the latter a case of State statute validly limitative of State suit, but not, thereby, of Federal suit).

[36]E. g., accrued judgment lien: Massingill v. Downs, 7 How. 760; L 12:903.

(In Bank of Tennessee v. Horn, 17 How. 157; L 15:70; the lien had not accrued).

[37]E. g.: Exemption of a particular municipal corporation from execution. Street R. R. v. Hart, 114 U. S. 654; S 5:1127; L 29:226.

[38]E. g., absence, in the Procedure law of a particular State in question, of provision for service upon an agent of a foreign corporation,

§ 752. Adaptation, in Adoption.

The text in question contemplates Federal Judicial modification and adaptation of the State Procedure law, in Federal adoption of it.[39]

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at the suit of others than citizens of the State; but in such situation the Common Law principles prevail in the District Courts of the United States in the absence of specific action of Congress. Barrow S. S. Co. v. Kane, 170 U. S. 100; S 18:526; L 42:964; Caledonian Coal Co. v. Baker, 196 U. S. 432; S 25:375; L 49:540.

[39]Thus, where State Procedure law specifies, for Procedure under execution, a certain class of State magistrate, a United States Commissioner may be substituted. Stevens v. Fuller, 136 U. S. 468; S 10:911; L 34:461.

CHAPTER CXL.

PLEADING:—AMENDMENT:—POWER OF ELECTION OF JURISDICTION (FEDERAL OR STATE) BY PLEADING:—PERSISTENCY OF JURISDICTION AS INITIALLY ESTABLISHED BY PLEADING.

§ 753. General Principles.

1. In so far as pleading does not deal with matter of Federal concern, it falls, at Common Law, within the principle of Adoption of State Practice.[1]

2. In other respects, the Federal Procedure law adopts (with necessary adaptation and specialization) the general Common Law and Equity principles of pleading.[2]

As matter of definition of its terms, our general proposition above presented, extends only to general law, of, or affecting, Procedure and Pleading; and does not extend to situations specifically dealt with by Federal Jurisdictional law proper.[3]

§ 754. Pleading of Mere Conclusions of Law:—Language of a Pleading as Controlled by Federal Judicial Knowledge.

Pleading, textually (a) invoking, or (b) excluding, Federal jurisdiction, is subject to the general Common Law and Equity principles: (a) of ineffectuality of pleading of mere conclusions of law;[4] and (b) of Judicial knowledge as controlling of the language of a pleading.[5]

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[1]Preceding Chapter. [2]Cases cited below.

[3]E. g., Citizenship, from the standpoint of diversity of citizenship; Removal, as affected by counter-suit pleaded; land-grant suits (§ 730).

[4]Thus, a mere textual assertion of Federal question, is ineffectual, if there are not pleaded specific facts supportive of the assertion. Florida Centr. R. R. v. Bell, 176 U. S. 321; S 20:399; L 44:486; North American Transp'n Co. v. Morrison, 178 U. S. 269; S 20: 869; L 44:1061; Southern Ry. v. King, 217 U. S. 524; S 30:594; L 54:868.

[5]Thus, where a plaintiff in a State Court, in a suit against a railroad corporation, alleged citizenship of the defendant as being the same as his own (thus textually excluding right of Removal), Federal Judicial knowledge of Federal incorporation of the defendant sup-

§ 755. Necessity of Affirmative Pleading of Jurisdictional Facts.

There being, in the field in question, no presumption of Federal, as against State, Jurisdiction, a pleader invoking the former Jurisdiction must disclose, upon his pleading, facts justifying his right thereto.[6]

§ 756. Power of Election of Jurisdiction, Through Pleading.

1. A proposing plaintiff may—as matter of pertinent general rules of Procedure and of Pleading—have a certain latitude of choice, either (a) as to the framing of his case, (as, in respect of joinder or non-joinder of defendants); or (b) as to the presentation of it, in his initial pleading. It is the Federal policy, in general,[7] not to interfere, on Federal Jurisdictional grounds, with a proposing plaintiff's such latitude of choice, so existing, even when, (or in so far as), it indirectly operates (a) to establish, or (b) to exclude, Federal Jurisdiction. That is to say, the Federal law, for purposes of Federal Jurisdiction, initial or by Removal, takes the plaintiff's case as he has framed it, and as he has pleaded it, (in a Federal Court, or in a State Court, as the case may be), and fixes thereby presence, or

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ported a petition for Removal, on the ground of Federal question appearing, as matter of law, upon the face of the plaintiff's pleading. Texas & Pac. Ry. v. Cody, 166 U. S. 606; S 17:703; L 41:1132.

[6]Robertson v. Cease, 97 U. S. 646; L 24:1057; Grace v. American Ins. Co., 109 U. S. 278; S 3:207; L 27:932; Steigleder v. McQuesten, 198 U. S. 141; S 25:616; L 49:986 ("resident of", instead of "citizen of", insufficient); Mansfield etc. Ry. v. Swan, 111 U. S. 379; S 4:510; L 28:462; (Removal petition; failure to allege citizenship as of the proper time: that of commencement of the suit); Thayer v. Life Assoc'n, 112 U. S. 717; S 5:355; L 28:864; Hancock v. Holbrook, 112 U. S. 229; S 5:115; L 28:714; Continental L. Ins. Co. v. Rhoads, 119 U. S. 237; S 7:193; L 30:380; (as to certain parties, no allegation of citizenship; insufficient); Chapman v. Barney, 129 U. S. 677; S 7:426; L 32:800; (ineffectiveness of characterization of a joint stock association as a "citizen"); Florida Centr. R. R. v. Bell, 176 U. S. 321; S 20:399; L 44:486.

See Hennessy v. Richardson Drug Co., 189 U. S. 25; S 23:532; L 47:697; "citizen of France" (rather than "citizen of the French Republic") sufficient.

[7]As to exceptions, see below.

absence, of Federal Jurisdiction, with disregard, (to this intent), of the defendant's pleading.[8]

2. As a result, a proposing plaintiff may have, and may exercise, an arbitrary and final power of election as between Federal and State Jurisdiction; and may even arbitrarily bring before a State court a controversy inherently of primary Federal Exclusiveness (as, a true Patent controversy).[9]

3. As matter of definition, the general proposition above presented, extends only to general law of, or affecting, Procedure and Pleading, and does not extend to situations specifically dealt with by Federal Jurisdictional law proper: as, to citizenship, from the standpoint of diversity of citizenship.

4. Congress has made certain exceptions to the general Federal policy in this field. Thus, in respect of land-grant as a ground of Federal Jurisdiction, exceptional provision is made, for sifting out the actual controlling issue, and for

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[8]Littlefield v. Perry, 21 Wall. 205; L 22:577; Peninsular Iron Co. v. Stone, 121 U. S. 631; S 7:1010; L 30:1020; White v. Rankin, 144 U. S. 628; S 12:768; L 36:569; Chappell v. Waterworth, 155 U. S. 102; S 15:34; L 39:85; Walker v. Collins, 167 U. S. 57; S 17:738; L 42:76; Chesapeake & O. Ry. v. Dixon, 179 U. S. 131; S 21:67: L 45:121; Excelsior Pipe Co. v. Pacific Bridge Co., 185 U. S. 282; S 22:681; L 46:910; Alabama Southern Ry. v. Thompson, 200 U. S. 206; S 26:161; L 50:441; Cincinnati & Tex. Pac. Ry. v. Bohon, 200 U. S. 221; S 26:166; L 50:448; Smithers v. Smith, 204 U. S. 632; S 27:297; L 51:656; In re Winn, 213 U. S. 458; S 29:515; L 53:873; Illinois Centr. Ry. v. Sheegog, 215 U. S. 308; S 30:101; L 54:208; Southern Ry. v. Miller, 217 U. S. 209; S 30:450; L 54:732; Chicago, B. & Q. Ry. v. Willard, 220 U. S. 413; S 31:460; L 55:521; Chicago, Rock Island & Pac. Ry. v. Schwyhart, 227 U. S. 184; S 33:250; L 57:473; The Fair v. Kohler Die Co., 228 U. S. 22; S 33:410; L 57:716; Chesapeake & O. Ry. v. Cockrell, 232 U. S. 146; S 34:278; L 58:544.

[9]As, by basing his suit upon a Patent assignment, or other contract relating to a colorable Patent, although the real controversy, in pais, between him and the defendant, is upon validity of the Patent; and although that controversy will, and ultimately does, by the defendant's pleading, appear to be the sole real issue in the cause. See cases last above cited.

As to State Judicial competency, in such situation, of such issues, see Collateral Issues (§ 575).

establishment of Federal Jurisdiction accordingly, where suit is initiated in a State Court.[10]

§ 757. Amendment of Pleading.

1. Prior to the Act of 1915.—Prior to the Act of 1915, cited above, the Federal Courts had broad discretionary power of Amendment of the plaintiff's pleading to cure absence of, or defect in, Jurisdictional averments,[11]—the power extending to a Removal petition, disclosing substantially, (but in imperfect form), ground of Removal.[12]

2. The Act of 1915[13] deals with the matter broadly.

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[10]§ 730, as to this and as to other examples.

[11]Halsted v. Buster, 119 U. S. 341; S 7:276; L 30:462; Powers v. Chesapeake & O. Ry., 169 U. S. 92; S 18:264; L 42:673; Mexican Centr. Ry. v. Duthie, 189 U. S. 76; S 23:610; L 47:715: (amendment after judgment); Tennessee v. Union Bank, 152 U. S. 454; S 14:654; L 38:511; Western Un. Tel. Co. v. Ann Arbor R. R., 178 U. S. 239; S 20:867; L 44:1052; Springstead v. Crawfordsville Bank, 231 U. S. 541; S 34:195; L 58:354; Seaboard Air Line v. Koennecke, 239 U. S. 352; S 36:126; L 60:324; (the latter a case of amendment after the close of the testimony, to show Federal Jurisdiction).

[12]Carson v. Dunham, 121 U. S. 421; S 7:1030; L 30:992; Kinney v. Columbia Savings etc. Ass'n, 191 U. S. 78; S 24:30; L 48:103.

A Removal petition presenting neither in form nor in substance a ground of Removal vested, prior to the Act of 1915, no jurisdiction, even for Amendment, in the Federal Court: Stevens v. Nichols, 130 U. S. 230; S 9:518; L 32:914; Crehore v. Ohio etc. Ry., 131 U. S. 240; S 9:692; L 33:144; Stevens's Adm'r v. Nichols, 157 U. S. 370; S 15:640; L 39:736; (power and discretion in respect of Amendment being thus left exclusively in the State Court).

[13]Act of March 3, 1915 (Amending the Judicial Code):—

> § 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.
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> § 274c. That where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the

3. AMENDMENT IN A STATE COURT.—No one of the three texts cited in this section has, (nor has the general Federal doctrine of Amendment), any bearing upon the matter of Amendment, in a State Court, of a Removal petition; but Amendment in such Court is pure matter of State Procedure, and is, thereby, not reviewable upon Federal Error to a State judgment.[14]

§ 758. Challenge of Jurisdictional Averments.

What has been said above is subject, it need hardly be said, to the power and duty of dismissal, by the Court, sua sponte, for absence of jurisdiction, in the strict sense.[15]

§ 759. Persistency of Jurisdiction, Once Established.

The general principle of persistency of Jurisdiction once established[16] is applicable in the field now in question.[17]

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time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal.

[14]Cases cited in par. 1, supra, ad fin.

[15]§§ 712, 713. As to mere Venue in a particular Federal District, see §§ 740-745.

As to challenge of jurisdiction, in general, see § 664.

[16]§§ 572, 721. [17]Ibid.

CHAPTER CXLI.

SERVICE OF PROCESS.

§ 760. As Matter of Form at Common Law.

1. The matter of form of service of process, at Common law, falls within the field, elsewhere considered, of Federal Adoption of State Procedure.[1]

2. In so far, in a particular situation, as the matter is not covered by Federally adopted State Procedure, service of process at Common Law is governed by Common Law principles,[2] as, where a particular situation is not provided for by State Procedure law in general adopted. Thus, where the (Federally adopted) Procedure law of a particular State makes provision for service upon a foreign (non-domestic) corporation only in suit by a resident plaintiff, a District Court of the United States, within the State, is not so limited, in issue, and in service, of process.[3]

§ 761. As Matter of Form, in Equity.

In Equity, the matter of form of service of process is governed by Act of Congress and by Rules of Court thereunder.[4]

§ 762. As Matter of Substance.

In certain classes of situations, service of process is mere matter of Substantive law,—chiefly law governing the matters: (a) of domicil, in law, of a natural person; (b) of constructive presence of a natural person; or (c) of constructive presence of a foreign corporation (by doing business, or by an agent, generally), within a State or a Federal District in question.[5]

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[1]§§ 746-752.

[2]Goldey v. Morning News, 156 U. S. 518; S 15:559; L 39:517; Barrow Steamship Co. v. Kane, 170 U. S. 100; S 18:526; L 42:964; Conley v. Mathieson Works, 190 U. S. 406; S 23:728; L 47:1113; Geer v. Mathieson Works, 190 U. S. 428; S 23:807; L 47; 1122; Caledonian Coal Co. v. Baker, 196 U. S. 432; S 25:375; L 49:540; Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245; S 29:445; L 53:782.

[3]Barrow S. S. Co. v. Kane, cited above; see also other cases cited above.

[4]U. S. Rev. Stats., § 917; Equity Rules of Supreme Court. See also Rev. Stats., § 918 (as to District Court Rules).

[5]Cases above cited; see also Domicil; Constructive Presence; Corporations (Foreign); and other specific Substantive heads.

CHAPTER CXLII.

DIRECT FEDERAL ENFORCEMENT OF STATE LAW OF COMMON LAW OR OF EQUITY CHARACTER:—STATE EXTENSION OF COMMON LAW OR OF EQUITY:—CONGRESSIONAL ADOPTION OF STATE SUBSTANTIVE WRITTEN LAW.

§ 763. Prefatory.

1. By direct enforcement, we here intend enforcement sought: (a) by a plaintiff proper, or (b) by an original defendant assuming, to certain intents (as, by a pleading of set-off or other counter-claim), the position of plaintiff. That is to say, the present Chapter will not treat of Federal dealing with issues arising merely incidentally.[1]

2. Such Federal direct enforcement may arise either (a) through initial suit in a Federal Court, or (b) by Removal, from a State Court, of a suit in which the plaintiff sought, in the State Court, such direct enforcement.

§ 764. The General Principle.

The intra-State Federal District Courts entertain, broadly, (general Jurisdictional conditions being present), initially, or by Removal, suits (including counter-suits) for direct enforcement of State law of non-Penal[2] Civil character, not within a field of State Exclusiveness.[3]

§ 765. Suit Upon a State Court Judgment.

1. Such Federal Jurisdiction extends to suit upon a judgment of a State Court.[4]

2. It extends to suit upon a judgment rendered in a suit which was, in itself, up to, and at, the point of rendering judgment, of strict State Exclusiveness.[5]

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[1]As to this latter matter, see Collateral Issues (§§ 575, 576).

[2]"Non-Penal": Oklahoma v. Gulf, Colorado & S. F. Ry., 220 U. S. 290; S 31:437; L 55:469; (Original Jurisdiction of the Supreme Court, but of general pertinency). See also §§ 585-587. See Gwin v. Breedlove, 2 How. 29; L 11:167.

[3]E. g.: the fields of Probate and Administration and of Domestic Relations, as those fields are Federally defined (§ 553).

[4]Chappell v. Bradshaw, 128 U. S. 132; S 9:40; L 32:369; cases cited below.

[5]E. g., to a Federal suit upon and for enforcement of a State alimony decree. Barber v. Barber, 21 How. 582; L 16:226.

3. It extends to Incidents attaching, by State law. to a State judgment: as, judgment lien, or priority in title.[6]

4. The nature of the cause of action embodied in the judgment, and the nature of the judgment, under State law, may be Federally inquired into, to such extent as is material in respect of Federal enforcement.[7]

§ 766. State Substantive Law, and State Law of Procedure.

Such Federal direct enforcement is, from the nature of the case, directed primarily to (State) Substantive law. It may happen, however, that Substantive State law is closely inter-related with (and is dependent upon) a method of Procedure peculiar to State law. In such situation, the Federal enforcement proceeds along the lines of such State Procedure, if, or in so far as, it is not inconsistent with essential Federal principles of Procedure.[8] This situation occurs mainly (and perhaps solely) in the field of State Extensions.[9]

This situation is commonly presented by a State statute creating, in terms, a new Judicial proceeding, and only by implication, or indirection, creating new Substantive law.[10]

What has been said above has no pertinency to Admiralty and Maritime Procedure: such Procedure being of Federal Exclusiveness.[11]

§ 767. Federal Classification, for the Purposes in Question, of State Law.

The Federal Organic classification of law,[12] (for Federal purposes), into, and according to, the great Common Law fields,[13] is operative, for the purposes now in question, upon

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[6]Guardian Trust Co. v. Fisher, 200 U. S. 57; S 26:186; L 50:367: direct enforcement of State judgment lien, as against mortgagors (in favor of intervening judgment creditors) in a Federal foreclosure suit.

[7]Guardian Trust Co. v. Fisher, cited above; Oklahoma v. Atchison T. & S. F. Ry., 220 U. S. 277; S 31:434; L 55:465.

[8]Cases cited in § 768.

[9]Ubi supra. As to State Extension, generally, see §§ 554-557.

[10]Ubi supra. [11]§§ 546, 703. [12]§§ 508, et seq.

[13]Common Law, Equity, etc. Fenn v. Holme, 21 How. 481; L 16: 198; cases cited below.

State law, both (a) for mode of Federal enforcement,[14] and (b) for denial of Federal enforcement.[15]

The Civil Law is capable of analysis upon the lines of the Common Law classification; and where, or in so far as, the law of a State is of Civil Law origin and character,[16] Common Law classification is applied to it.[17]

Such Federal classification extends (from the nature of the case) not merely to specific particulars of law known to the Common Law, but to State Extensions. It is in the field of State Extensions that the question of Federal classification of State law (for Federal direct enforcement) commonly arises.[18]

§ 768. Federal Such Enforcement of State Extensions: (a) Generally.[19]

1. Such Federal direct enforcement extends to State Extension of the great Common Law fields.[20]

2. A State cannot deal with Admiralty and Maritime Procedure: that field being of Federal Exclusiveness.[21]

A State Extension, therefore, of Substantive Admiralty and Maritime law, so far as Federally enforceable, and as Federally enforced, in Admiralty, is enforced exclusively by Federal Admiralty Procedure: which is uniform throughout the States.[22]

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[14]Surgett v. Lapice, 8 How. 48; L 12:982; Mills v. Scott, 99 U. S. 25; L 25:294; Cowley v. Northern Pac. R. R., 159 U. S. 569; S 16:127; L 40:263; other cases cited below in this Chapter.

[15]E. g., in respect of State law of Penal character: Oklahoma v. Atchison T. & S. F. Ry., 220 U. S. 277; S 31:434; L 55:465; (classification of a State cause of action as Penal: Original Jurisdiction of the Supreme Court, but of general pertinency).

[16]The typical State being Louisiana.

[17]Parsons v. Bedford, 3 Pet. 433; L 7:732; Walker v. Dreville, 12 Wall. 440; L 20:429; Marin v. Lalley, 17 Wall. 14; L 21:596; New Orleans v. Gaines's Adm'r, 131 U. S. 191; 138 U. S. 595; S 9:745; L 33:99; S 11:428; L 34:1102; Lindsay v. Shreveport Bank, 156 U. S. 485; S 15:472; L 39:505.

[18]See later sections, and cases cited.

[19]As to Extension in general, see §§ 554-557.

[20]Cases cited below in this section. As to Federal enforcement of a State abolition of the doctrine of Champerty and Maintenance, see Roberts v. Cooper, 20 How. 467; L 15:969.

[21]§ 546.

[22]§ 546.

As to alternative Common Law Remedy, see § 527.

3. State Extension is usually made by Written Law.[23]

In certain of the older States, however, there arose, at an early period, (and in those, and in other States, there have arisen at later periods), Extensions by mere usage: that is to say, by Unwritten (State) Law. Extensions of this latter origin are, in general, (if not regularly), Federally recognized on the footing of Extensions by Written law,[24] —more readily, perhaps, when they deal with local land-title law,[25] or with other local matters.[26]

§ 769. The Same Subject Continued: (b) Illustration.

Illustration of the text of the preceding Section may be presented as follows:—

COMMON LAW.

1] Federal enforcement of a State Extension of Tort, to the case of immediate death;[27]

2] Federal enforcement of a State statute attaching a lien to Common Law judgments.[28]

EQUITY.

3] Federal enforcement of State Extension of the Equity (and Equity Procedure), of removal of cloud from title: (a) to the situation where the plaintiff is in possession;[29] (b) to the situation where there is no actual, and no prac-

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[23]Commonly by Statute, but perhaps in some cases, by a State Constitution.

[24]Crampton v. Zabriskie, 101 U. S. 601; L 25:1070; Missouri, Kansas etc. Trust Co. v. Krumseig, 172 U. S. 351; S 19:179; L 43:474; Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638; S 20:824; L 44:921; Graves v. Ashburn, 215 U. S. 331; S 30:108; L 54:217; Louisville & Nashville R. R. v. Western Un. Tel. Co., 234 U. S. 369; S 34:810; L 58:1356.

[25]As in Graves v. Ashburn, and Louisville etc. R. R. v. Western Union Tel. Co., both cited above.

[26]Crampton v. Zabriskie, cited above.

[27]Texas & Pac. Ry. v. Cox, 145 U. S. 593; S 12:905; L 36:829; Chicago, Rock Island etc. Ry. v. Martin, 178 U. S. 245; S 20:854; L 44:1055.

[28]Guardian Trust Co. v. Fisher, 200 U. S. 57; S 26:186; L 50:367; (the Federal enforcement, in this instance, being in Equity, for the reason that the lienor intervened in a pending Equity suit).

[29]Clark v. Smith, 13 Pet. 195; L 10:123; Holland v. Challen, 110 U. S. 15; S 3:495; L 28:52; United States v. Wilson, 118 U. S. 86; S 6:991; L 30:110; Whitehead v. Shattuck, 138 U. S. 146;

ticable, possession, by either party;[30] (c) to the situation of challenge by the bill (as a cloud) of a deed void on its face;[31] (d) to broad title-clearing action, in one or in another form, binding upon particular persons (or particular classes of persons, or upon all persons, known or unknown) not personally within the areal Judicial Jurisdiction of the State in question; with appropriate substituted service, or operation of the decree in rem, upon the land, or a substituted agent, to release;[32]

4] Federal enforcement in Equity, of State statutory liens;[33]

5] Federal suit, of a character provided for by State statute, in behalf of a borrower, as against a usurious lender; with Extension of Equity, by relieving the borrower-plaintiff from payment of value received;[34]

6] Federal suit in a special State-statutory form, for annulment, inter partes, of a State judgment: (simplification of the usual procedure by Bill in Equity);[35]

S 11:276; L 34:873; Wehrmann v. Conklin, 155 U. S. 314; S 15:129; L 38:167; Boston etc. Mining Co. v. Montana Ore Co., 188 U. S. 632; S 23:434; L 47:626.

[30]Graves v. Ashburn, 215 U. S. 330; S 30:108; L 54:217; see Boston etc. Mining Co. v. Montana Ore Co., cited above.

[31]Reynolds v. Crawfordsville Bank, 112 U. S. 405; S 5:213; L 28:733; Graves v. Ashburn, cited above.

[32]Wickliffe v. Owings, 17 How. 47; L 15:44; Parker v. Overman, 18 How. 137; L 15:318; Langdon v. Sherwood, 124 U. S. 74; S 8:429; L 31:344 (a Federal action at law, but enforcing the State Equitable Extension); Arndt v. Griggs, 134 U. S. 316; S 10:557; L 33:918; Gormley v. Clark, 134 U. S. 338; S 10:554; L 33:109; Bardon v. Land etc. Improve't Co., 157 U. S. 327; S 15:650; L 39:719; American Land Co. v. Zeiss, 219 U. S. 47; S 31:200; L 55:82.

(In Hart v. Sansom, 110 U. S. 151; S 3:596; L 28:101, there was no such Extension, and the bill thereby failed. The case is explained in Arndt v. Griggs, cited above).

[33]Fitch v. Creighton, 24 How. 159; L 16:596; Canal Co. v. Gordon, 6 Wall. 561; L 18:894; Sheffield Furnace Co. v. Witherow, 149 U. S. 574; S 13:936; L 37:853; Slide & Spur Gold Mines v. Seymour, 153 U. S. 509; S 14:842; L 38:802; see Dick v. Foraker, 155 U. S. 404; S 15:124; L 39:201.

[34]Missouri & Kansas Trust Co. v. Krumseig, 172 U. S. 351; S 19:179; L 43:474.

[35]Cowley v. Northern Pac. R. R., 159 U. S. 569; S 16:127; L 40:263.

7] Federal following of State statutory Equitable Procedure in respect of survival of suits, and of substituted representative defendants;[36]

8] Federal enforcement, in Equity, of a State Extension of the Substantive law of Subrogation;[37] or of

9] State statutory Procedure, permitting a junior mortgagee to join, in a foreclosure suit, the mortgagor and the senior mortgagee.[38]

§ 770. State Extension of Common Law Remedy as not Limitative of Federal Equity Jurisdiction.

The field of Equity Jurisdiction is limitatively defined by absence of plain, complete and adequate remedy at law.[39]

State Extension, however, of Common Law remedy does not, pro tanto, work a diminution of the Federal Equity Jurisdiction now in question.[40]

§ 771. Congressional Adoption of State Substantive Written Law.

1. GENERALLY.—We have considered elsewhere, from the standpoint of the Equal Protection aspect[41] of the Due Process clause of the Fifth Amendment, the power of Congress to adopt distributively, Substantive law of the States, severally.[42]

2. STATE WRITTEN SUBSTANTIVE LAW IN THE FEDERAL INTRA-STATE ORIGINAL JURISDICTION.[43]—The text cited,

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[36]Taylor v. Benham, 5 How. 233; L 12:130; (see p. 261, first par.).

[37]New Orleans v. Gaines's Adm'r, 131 U. S. 191; 138 U. S. 595; S 9:745; L 33:99; S 11:428; L 34:1102; but with Federal disregard of the State statutory remedy: which was (in Federal definition thereof) at law.

A State statute providing for suit in Equity by a simple (non-judgment) creditor, is Federally viewed as inconsistent (from the standpoint of Federal enforcement of State law) with fundamental Federal principles of Equity Procedure, and is, therefore, not followed in a Federal Court. Scott v. Neely, 140 U. S. 106; S 11:712; L 35:358; Cates v. Allen, 149 U. S. 451; S 13:883; L 37:804; Hollins v. Brierfield Coal Co., 150 U. S. 371; S 14:127; L 37:1113.

[38]Fritzlen v. Boatmen's Bank, 212 U. S. 364; S 29:366; L 53:551.

[39]As to which, generally, see Equity.

[40]Robinson v. Campbell, 3 Wh. 212; L 4:372; McConihay v. Wright, 121 U. S. 201; S 7:940; L 30:932; Mississippi Mills v. Cohn, 150 U. S. 202; S 14:75; L 37:1052.

[41]§ 427. [42]§§ 497-499.

[43]Rev. Stats., § 721:—

The laws of the several States, except where the Constitution,

(originating in the Judiciary Act of 1789), applies only to Written law;[44] and is, in legal effect, operative: (a) only in respect of Written law of a State,[45] and (b) only in respect of such Written law of a State, as is of peculiarly local interest and concern.[46]

If the text cited may be said to deal in any degree with State Interpretation by State Judicial decision of State Written law, it deals therewith only to the extent to which such State Interpretation is itself of peculiar local (and is not of Federal) concern.[47]

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treaty, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

[44]Swift v. Tyson, 16 Pet. 1; L 10: 865; many later cases: see Following, or Not, of State Decisions, (§§ 688 et seq.).

[45]Swift v. Tyson, cited above; Burgess v. Seligman, 107 U. S. 20; S 2: 10; L 27: 359.

[46]Not, for example, to a State statute dealing with commercial paper. Cases last cited.

[47]§§ 689-697.

As to following, by a Federal Judicial Receiver, or the like, of State law, see Jud. Code, § 65.

CHAPTER CXLIII.

GENERAL FEDERAL JUDICIAL RELATIONS, IN FEDERAL ORIGINAL JURISDICTION, WITH STATE PROBATE AND ADMINISTRATION PROPER.

§ 772. Prefatory.

It is the accepted view that (whether as matter of Federal Organic law, or by tacit Congressional consent, we need not here inquire), the intra-State Federal Courts are not vested with Original direct Probate or Administration Jurisdiction; the definition and delimitation of this field being fixed, to this intent, by (Federally Adopted) Common Law definition and delimination of it.

§ 773. Issues Subsidiary to Probate or Administration Issues Proper.

In (or in connection with) a State Probate or Administration suit proper, there must, however, necessarily arise, at one or at another point, issues inherently not of Probate or Administration character. Such issues would ordinarily be of Common Law or of Equity character, but may be of any Civil character.[1]

Such issues, (when and in so far as general Federal Jurisdictional conditions exist),[2] are of general Federal competency.[2]

Actual Federal Jurisdiction of such issues may arise (or may exist) in either of three typical forms, as follows:

(1) When they are, at the decedent's death, actually pending in a Federal District Court, the Federal Jurisdiction does not lose possession of them but proceeds to determination of them.[3]

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[1]E. g., issues of Federal Bankruptcy, or Admiralty character; or of Taxation, or of Eminent Domain Compensation character,—existing at, and surviving, the death of a decedent, and persisting in respect of his estate, or arising after his death.

[2]Farrell v. O'Brien, 199 U. S. 89; S 25:727; L 50:101; see particularly p. 93; "and because of the absence of necessary parties, who, if made parties, would oust the court of jurisdiction" * * *.

[3]See succeeding sections.

As to Federal Procedure, in such case, after, and in enforcement of, the (Federal) judgment, see § 776.

(2) Where they initially arise of record in the (State) Probate Court after the decedent's death,[4] the Federal Original Jurisdiction may take possession of them, by Removal of them to the appropriate Federal Court, as separable controversies.[5]

(3) Where they are not within either of the two classes or situations above considered, the Federal Jurisdiction may take possession of them, either (a) by initial suit upon them in a Federal Court, or (b) by Removal of a suit brought upon (or in respect of) them in a State Court not of Probate character.[5]

§ 774. Illustration.

Illustrative such issues (and, incidentally, illustration of such several forms or modes of Federal retention or assumption of them) may be presented as follows:—

(1) Issues of surviving pecuniary liability of the decedent: presented ordinarily by suit against the executor or administrator, as such.[6]

(2) Issues (a) of existence and of survival of a predecease lien upon specific estate late of the decedent, and (b) of foreclosure.[7]

(3) Issues of title to specific property, as between a stranger and the estate.[8]

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[4]As, by presentation there of a creditor's claim, or upon a petition for distribution of assets.

[5]Cases cited below, in this Chapter.

[6]Siglar v. Haywood, 8 Wh. 675; L 5:713; Suydam v. Broadnax, 14 Pet. 67; L 10:357; Aspden v. Nixon, 4 How. 467; L 11:1059; McLean v. Meek, 18 How. 16; L 15:277; Union Bank v. Jolly's Adm'rs, 18 How. 503; L 15:472; Smith v. Chapman, 93 U. S. 41; L 23:795; Johnson v. Powers, 139 U. S. 156; S 11:525; L 35:112; Green's Adm'x. v. Creighton, 23 How. 90; L 16:419; Johnson v. Waters, 111 U. S. 640; S 4:619; L 28:547; Hess v. Reynolds, 113 U. S. 73; S 5:377; L 28:927 (Removal); Borer v. Chapman, 119 U. S. 587; S 7:342; L 30:532; Rio Grande R. R. v. Gomila, 132 U. S. 478; S 10:155; L 33:400; Clark v. Bever, 139 U. S. 96; S 11:468; L 35:88; Lawrence v. Nelson, 143 U. S. 215; S 12:440; L 36:130; Bristol v. Washington County, 177 U. S. 133; S 20:585; L 44:701 (Removal).

[7]Rio Grande R. R. v. Gomila, cited above; Ingersoll v. Coram, 211 U. S. 335; S 29:92; L 53:208.

[8]Ingersoll v. Coram, cited above.

(4) An issue of Interpretation of a will.[9]

(5) An issue of refusal (and of propriety of refusal) of an executor or administrator, to sue in behalf of his estate: and of right of creditors or beneficiaries to sue.[10]

(6) Issues of privity, and of conflict of rights, as between (a) an executor or a principal administrator, and (b) one appointed as ancillary administrator in another State.[11]

(7) An issue of the legal effect of informal action by an executor or administrator out of his State, and without ancillary appointment.[12]

(8) An issue of liability of an executor or an administrator (or of his sureties) to creditors or beneficiaries of the estate.[13]

(9) Issues among rival claimant beneficiaries.[14]

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[9]Jackson v. Chew, 12 Wh. 153; L 6:583; Page v. Patton, 5 Pet. 304; L 8:134; Taylor v. Benham, 5 How. 233; L 12:130; Colton v. Colton, 127 U. S. 300; S 8:1164; L 32:138; Albright v. Oyster, 140 U. S. 493; S 11:916; L 35:534; Hardenbergh v. Ray, 151 U. S. 112; S 14:305; L 38:93; Farrell v. O'Brien, 199 U. S. 89; S 25: 727; L 50:101.

[10]Hagan v. Walker, 14 How. 29; L 14:312; Horn v. Lockhart, 17 Wall. 570; L 21:657.

[11]Aspden v. Nixon, 4 How. 467; L 11:1059; Stacy v. Thrasher, 6 How. 44; L 12:337. See Foulke v. Zimmerman, 14 Wall. 113; L 20:785.

[12]Vaughan v. Northup, 15 Pet. 1; L 10:639; McLean v. Meek, 18 How. 16; L 15:277; Wilkins v. Ellett, 108 U. S. 256; S 2:641; L 27:718; Johnson v. Powers, 139 U. S. 156; S 11:525; L 35:112; Lawrence v. Nelson, 143 U. S. 215; S 12:440; L 36:130; Hayes v. Pratt, 147 U. S. 557; S 13:503; L 37:279; Darlington v. Turner, 202 U. S. 195; S 26:630; L 50:992; Ingersoll v. Coram, 211 U. S. 335; S 29:92; L 53:208.

[13]Young v. Smith, 15 Pet. 287; L 10:741; Green's Adm'x v. Creighton, 23 How. 90; L 16:419; Borer v. Chapman, 119 U. S. 587; S 7:342; L 30:532; Lawrence v. Nelson, cited above; Hayes v. Pratt, cited above; Byers v. McAuley, 149 U. S. 608; S 13:906; L 37:867; Ingersoll v. Coram, cited above; Waterman v. Canal- Louisiana Bank, 215 U. S. 33; S 30:10; L 54:80; McClellan v. Carland, 217 U. S. 268; S 30:501; L 54:762.

[14]Aspden v. Nixon, cited above; Payne v. Hook, 7 Wall. 425; L 19:260; Caujolle v. Ferrié, 13 Wall. 465; L 20:507; Hook v. Payne, 14 Wall. 252; L 20:887; Johnson v. Waters, 111 U. S. 640, 675 IV; S 4:619; L 28:547; Borer v. Chapman, cited above; Hayes v. Pratt, cited above.

(10) An issue of marriage, or of legitimacy, underlying the claim of a claimant beneficiary.[15]

(11) An issue of title by assignment from an original creditor or beneficiary.[16]

(12) An issue of jurisdiction (on general grounds) as between the home State and another areal jurisdiction, of a suit against an executor or an administrator.[17]

(13) An issue upon the validity, operation, and scope, (as a deed of trust), of a non-testamentary writing probated as a will.[18]

§ 775. General Federal Jurisdictional Requirements as Operative Peculiarly in the Field in Question.

In respect of a particular such issue, general Federal Jurisdictional conditions[19] may be present (a) as between some, but not as between all, parties concerned in the estate; or (b) in respect of some part (but only of some part) of a subject-matter in question. In such situation, the Federal Jurisdiction (where severability is, on general principles, possible) proceeds to the extent (and only to the extent) of presence of such general Federal Jurisdictional conditions.[20]

§ 776. Principles of Federal Enforcement of Judgment.

A Federal Court which has rendered judgment upon such an issue, is not permitted, by present Federal Procedure law, for enforcement of such judgment, either (a) to address either a writ of Injunction[21] or a Mandatory writ, directly to the State Probate Court (or to any State Court) or (b) to issue and levy execution[22] upon specific property of the estate.[23]

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[15]Gaines v. New Orleans, 6 Wall. 642; L 18:950.

[16]Ingersoll v. Coram, cited above (see at p. 360).

[17]Vaughan v. Northup, cited above. [18]Hayes v. Pratt, cited above.

[19]E. g., Federal question; Diversity of Citizenship; Amount.

[20]Byers v. McAuley, 149 U. S. 608; S 13:906; L 37:867; in contrast with the otherwise like case of Johnson v. Waters, 111 U. S. 640, 675; S 4:619; L 28:547 (see the language of the decree).

[21]See Injunction to State Court (§§ 655, 656).

[22]By "execution" here we mean the ordinary writ of execution (fieri facias).

[23]Williams v. Benedict, 8 How. 107; L 12:1007; Yonley v. Lavender, 21 Wall. 276; L 22:536.

Such levy would be prohibitive of orderly disposal of the assets, and

A Federal Court, however, has power to act upon parties;[24] and, in proper form of Federal Procedure, an executor or an administrator may be made a party;[25] and, by action upon parties, the Federal judgment may be made effective. Typical modes of enforcement, in this manner, of a Federal judgment, are: establishment, as among parties and privies, and those claiming under them, (a) of a lien, (pre-existing decease), upon specific property held as, or claimed to be, estate late of the decedent; or (b) of the proper interpretation of a (probated) will of the decedent; or (c) in general, of rights of claimant beneficiaries; or (d) of liability of an executor or an administrator to the estate; or (e) of existence of amount, and of character (where character is material), of a claim against the estate.[26]

In such enforcement, inter partes, a Federal Court of Equity may, inter partes, (where the Federal Jurisdictional ground[27] extends to all parties interested, including the executor or administrator), virtually take the accounting, marshalling, conversion into money, and distribution, of assets, into its own hands.[28]

If, on the other hand, such general grounds of Federal Jurisdiction do not extend to all persons beneficially interested, but the Federal Jurisdiction does extend to the executor or the administrator, the Federal Court will so act only in respect of persons to whom such general Federal Jurisdictional grounds extend.[29]

(in case of shortage of assets) with the marshalling and the ratable distribution of assets, as among creditors.

[24]§§ 655, 656.

[25]Numerous cases of those cited in this Chapter.

[26]For cases (readily distinguishable) pertinent to these, and to other like heads, respectively, see preceding sections of this chapter.

[27]E. g., Federal question or diversity of citizenship, and Amount.

[28]Johnson v. Waters, 111 U. S. 640; S 4:619; L 28:547 (Decree, p. 675).

[29]Byers v. McAuley, 149 U. S. 608; S 13:906; L 37:867.

CHAPTER CXLIV.

Corresponding Principles In the Fields of Domestic Relations and State Insolvency Procedure.

§ 777. Domestic Relations.

What has been said in the several sections of the preceding Chapter would seem to be entirely applicable, mutatis mutandis, to the field of Domestic Relations: there being no higher ground of State Exclusiveness in this field than in the field of Probate and Administration.

Thus, a suit pending in a Federal Court, against a husband or a wife, to enforce a personal liability, or to recover property, would not be affected, in respect of jurisdiction, by a subsequently brought Divorce suit; but a decree of Divorce and of Alimony would be subject to the judgment in the Federal suit.

So, pendency of a Divorce suit would not bar the institution, in a Federal Court, of a suit dealing with title or with liability, as to husband or wife.

So, a Common Law or Equity separable issue, arising in a Divorce or in a Guardianship proceeding, is within the Federal Removal Procedure.[1]

§ 778. State Insolvency Procedure.

What has just been said would seem to be applicable, mutatis mutandis, to the field of State Insolvency Procedure, when, or in so far as, at a particular period, there exists, within a particular State, operative State law within that field.[2]

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[1]See Removal.

[2]Shelby v. Bacon, 10 How. 56; L 13: 326; (Federal suit against assignees in Insolvency, to establish the validity and the amount of the plaintiff's claim).

CHAPTER CXLV.

IMPLIED REMEDY.—IMPLIED ABSENCE OF REMEDY.

§ 779. The Subject Generally.

Federal Adoption and application of the Common Law principles of implication or presumption (a) of Remedy or (b) of absence of Remedy, is illustrated in the cases cited in the margin,[1] of:—

1. IMPLIED REMEDY, AFFIRMATIVE OR DEFENSIVE;[2]

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[1]The cases cited in this section arose in the Federal Original Jurisdiction, except where State Court origin is stated.

[2]Amy v. Supervisors, 11 Wall. 136; L 20:101; (Tort lies for failure to perform a ministerial duty).

Findlay v. McAllister, 113 U. S. 104; S 5:401; L 28:930; (Tort lies for forcible interference with a State tax levy proceeding under Federal Mandamus).

Murphy v. Ramsey, 114 U. S. 15; S 5:747; L 29:47 (election officials: refusing vote).

Union Pac. Ry. v. McDonald, 152 U. S. 262; S 14:619; L 38:434; (a State statutory requirement of fencing-in of a dangerous area, for keeping cattle out, held, in the Federal Jurisdiction by diversity of citizenship, presumptively creative, by indirection, of right of action of tort.)

Bement v. National Harrow Co., 186 U. S. 70; S 22:747; L 46:1058; violation by the plaintiff of the Sherman Act a defence in an action (for price of goods), in a State Court.

Wabash R. R. v. Pearce, 192 U. S. 179; S 24:231; L 48:397; (if a carrier under express or implied authority from his bailor, pays a Federal revenue tax, as a necessary condition of getting possession of the goods, the Common Law carrier's lien for disbursements is, as matter of Federal law, correspondingly extended to include his such disbursement). (State Court).

Johnson v. Southern Pac. Co., 196 U. S. 1; S 25:158; L 49:363; the Congressional Safety Coupling Act vests, by implication (as matter of Federal Law) in railroad employers, a right of action at Common Law for breach of duty by the railroad.

Illinois Centr. R. R. v. McKendree, 203 U. S. 514; S 27:153; L 51:298; (assumed that a cause of action arises to cattle owner from violation of a Federal quarantine order by bringing diseased cattle into proximity with plaintiff's cattle and infecting them).

United States v. Chamberlin, 219 U. S. 250; S 31:204; L 55:204; (when no remedy is specifically provided for enforcement of taxation. a Common Law action lies).

Waskey v. Hammer, 223 U. S. 85; S 32:187; L 56:359; (remedy

2. Absence of Implied Remedy, Affirmative or Defensive.[3]

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in Ejectment against one who, being a Federal official, acquired title to land in violation of an Act of Congress providing in terms for dismissal from office as a penalty therefor).

Texas & Pac. Ry. v. Rigsby, 241 U. S. 33; S 36:482; L 60:874; (Federal rolling-stock requirements for intertransit, basis of tort, though plaintiff not in intertransit).

[3]Board of Trade v. Christie Grain etc. Co., 198 U. S. 236; S 25: 637; L 49:1031; (certain transactions involving illegality, viewed as not thereby caput vulpi, but capable of suit).

The Eugene F. Moran, 212 U. S. 466; S 29:339; L 53:600: breach of a Federal legal duty of maintaining a light, for a special purpose, held not to create a liability for the (negligent) tort of a stranger, simply because the observance of the duty might have prevented the tort.

German Alliance Ins. Co. v. Home Water Co., 226 U. S. 220; S 33: 32; L 57:195: (absence of liability of a municipal corporation for failure of water-supply for fire protection; explaining Guardian Trust Co. v. Fisher, 200 U. S. 57; S 26:186; L 50:367).

Southern Pac. Co. v. Schuyler, 227 U. S. 601; S 33:277; L 57: 662; giving to, and use by, a railroad clerk, when off duty, of a free pass, in violation of the Hepburn Act of Congress (such action being under a misconception of law), not a Federal bar to tort by the clerk. (State Court).

CHAPTER CXLVI.

MOTIVE OR INTENT IN SEEKING, OR IN SEEKING TO AVOID, THE FEDERAL JURISDICTION:—FICTITIOUS JURISDICTIONAL SITUATIONS.

§ 780. The General Principle.

Where a situation, of fact and of law, exists, in and of itself such in character as (a) to permit or (b) to forbid resort to the Federal Original Common Law or Equity Jurisdiction, motive or intent, in the creation of, or in the making use of, such situation, is, in general, immaterial: as, where a belief in a more favorable result in a Federal, than in a State, Court was a moving element in the conveyance, (and in the acquirement), of property or of an interest in property to or by one competent, by citizenship, (as the vendor was not), for the Federal Jurisdiction.[1]

So, if any one of a number of persons has a right of suit in Equity; and if one, but only one, of them, is of citizenship such as, (in and of itself), to make diversity of citizenship (and thereby Federal Jurisdiction), the right of such latter person to sue in a Federal (rather than in a State) Court is not adversely affected by the fact that he sues solely at the instance of, and with indemnity from, another such former person.[2]

So, one having a joint and several cause of action (or color thereof, and belief thereof, in good faith) against two or more persons, may, at pleasure, omit, or join, in a State Court, a particular person, even though his election be in fact made to defeat Federal Removal Jurisdiction based upon diversity of citizenship.[3]

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[1]M'Donald v. Smalley, 1 Pet. 620; L 7:287; Smith v. Kernochen, 7 How. 198; L 12:666; Crawford v. Neal, 144 U. S. 585; S 12:759; L 36:552; In re Cleland, 218 U. S. 120; S 30:647; L 54:962.

See, to the same effect, in the case of suit by a State, in the Original Jurisdiction of the Supreme Court, South Dakota v. North Carolina, 192 U. S. 286; S 24:269; L 48:448.

[2]Wheeler v. Denver, 229 U. S. 342; S 33:842; L 57:1219.

[3]Chicago, Rock Island & Pac. Ry. v. Dowell, 229 U. S. 102; S 33:684; L 57:1090; Chicago, Rock Island & Pac. Ry. v. Whiteaker, 239 U. S. 421; S 36:152; L 60:360.

See the following sections.

§ 781. Mere Colorable Situations.

What has been said in the preceding section, has no bearing upon the creation of mere fictitious and colorable situations.

Typical forms of fictitious and colorable Jurisdictional situations may be classified, for illustration, as follows:—

FICTITIOUS PLAINTIFFS.

Creation of a figure-head plaintiff, of a certain citizenship, essential, in a given instance, for Federal Jurisdiction;[4]

Manipulation of separate claims, (severally below a Federal Jurisdictional amount), to create an apparently genuine Jurisdictional amount;[5]

FICTITIOUS DEFENDANTS.

Joinder by the plaintiff, in a State Court, (to defeat Removal to a Court of the United States), of a co-defendant, of the same citizenship with the plaintiff, without color of liability of such person as such co-defendant in such suit; and with knowledge (or notice, actual or constructive), on the plaintiff's part, of such absence of color of liability.[6]

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[4]E. g., (a) creating a corporation and vesting it with legal title, merely for purposes of suit, with no substantial change of ownership, Lehigh Mining Co. v. Kelly, 160 U. S. 327; S 16:307; L 40:444; Miller & Lux v. East Side Canal Co., 211 U. S. 293; S 29:111; L 53:189; Southern Realty Co. v. Walker, 211 U. S. 603; S 29:211; L 53:346; see Cashman v. Amador Canal Co., 118 U. S. 58; S 6:926; L 30:72; (b) creating, in a proposed figure-head plaintiff, the status of bearer, endorsee, or assignee without beneficial title, (Williams v. Nottawa, 104 U. S. 209; L 26:719; Bernards Township v. Stebbins, 109 U. S. 341; S 3:252; L 27:956; Farmington v. Pillsbury, 114 U. S. 138; S 5:807; L 29:114; Lake County v. Dudley, 173 U. S. 243; S 19:398; L 43:684; Waite v. Santa Cruz, 184 U. S. 302; S 22:327; L 46:552; Woodside v. Beckham, 216 U. S. 117; S 30:367; L 54:408); or of grantee of land, under like circumstances (Barney v. Baltimore, 6 Wall. 280; L 18:825); a speculative share in net proceeds of the suit not being operative to remove disqualification. Lake County v. Dudley, cited above.

[5]See Jurisdictional Amount.

[6]Kansas City Suburban Ry. v. Herman, 187 U. S. 63; S 23:24; L 47:76; Wecker v. National Enameling Co., 204 U. S. 176; S 27:184; L 51:430. See Chicago, Rock Island & Pac. Ry. v. Schwyhart, 227 U. S. 184; S 33:250; L 57:473.

In such situation, reckless omission, by the plaintiff, of proper inquiry, involves constructive notice to him. Cases cited.

While the creation of such a fictitious situation, of either class, is a nullity, and has, in general, no Federal Jurisdictional operation adverse to the creator of the situation,[7] it may give rise to purely remedial right, as against such person. Thus, if a plaintiff in a State Court makes, upon his pleading or other procedure, (as, his joinder of parties), a fictitious non-Removable case, with intent to bar Removal; and, after lapse of the Federal statutory Removal period, amends his case, by elimination of the non-Removal feature, a new Removal period thereby opens, in favor of the defendant.[8]

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[7]Provident Savgs. Soc'y v. Ford, 114 U. S. 635; S 5:1104; L 29: 261; Oakley v. Goodnow, 118 U. S. 43; S 6:944; L 30:61.

[8]Powers v. Chesapeake & O. Ry., 169 U. S. 92; S 18:264; L 42: 673. So, in effect, Remington v. Central Pac. R. R., 198 U. S. 95; S 25:577; L 49:959. See, also, under Moot Case (§§ 590, 591).

CHAPTER CXLVII.

CONSENT, WAIVER, AND ESTOPPEL, IN RESPECT OF JURISDICTION.

§ 782. Consent.

Except in mere details, of no Federal significance,[1] parties cannot, by consent or agreement, (a) create Federal Original Common Law or Equity Jurisdiction,[2] or (b) oust that Jurisdiction.[3]

§ 783. Waiver and Estoppel: (a) as Supportive of Federal Jurisdiction.

1. IN FIELDS NOT OF REAL FEDERAL CONCERN.—Waiver and Estoppel are given a very liberal operation in fields not of real Federal concern; as: in the matter of venue, in transitory actions, as between two districts;[4] in the matter of time or stage of initiation, in a State Court, (or of other mere details), of Removal procedure;[5] and in the matter of absence of, or of defects in service of, process.[6]

2. IN FIELDS OF REAL FEDERAL CONCERN, GENERALLY.—Waiver and Estoppel are given operation, to a very considerable extent, in favor of Federal Jurisdiction, in fields, also, of real Federal concern, where, however, no fundamental principle is actually involved: as, in the distinction between Common Law and Equity, when jury trial is not actually in question;[7] or as between different forms or

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[1]E. g., venue, as between two Federal Districts, in a transitory action. See Venue (§§740-745).

[2]Webster v. Buffalo Ins. Co., 110 U. S. 386; S 4:79; L 28:172; In re Winn, 213 U. S. 458; S 29:515; L 53:873. See Wallace v. Anderson, 5 Wh. 291; L 5:91.

[3]Insurance Co. v. Morse, 20 Wall. 445; L 22:365.

[4]See Venue (§§ 740-745).

[5]Martin v. Baltimore & O. R. R., 151 U. S. 673; S 14:533; L 38:311; Mackay v. Uinta Development Co., 229 U. S. 173; S 33:638; L 57:1138.

[6]Merchants' Heat Co. v. Clow, 204 U. S. 286; S 27:285; L 51:488.

[7]Brown v. Lake Superior Iron Co., 134 U. S. 530; S 10:604; L 33:1021; Cowley v. Northern Pac. R. R., 159 U. S. 569; S 16:127; L 40:263; Perego v. Dodge, 163 U. S. 160; S 16:971; L 41:113; Southern Pac. R. R. v. United States (No. 1), 200 U. S. 341; S 26:

branches of Equity Procedure;[8] or in respect of transfer of a particular pending cause in a Territorial Court to a Federal, or to a State, Court, upon establishment of Statehood;[9] or in respect of particulars of Removal.[10]

3. In Fields of Real Federal Concern, after Judgment.—In fields of real Federal concern, Waiver and Estoppel are given a greater degree of operation, after judgment.[11]

§ 784. Waiver and Estoppel: (b) as Operative Adversely to Federal Jurisdiction.

Illustration of effectual Waiver and Estoppel adverse to Federal Jurisdiction may be presented as follows:

Taking pecuniary benefit, by a defendant, under a (State Court's) judgment, good on its face, but void for lack of service, estops the defendant from challenging the judgment in a (Federal) Court in Equity.[12]

296; L 50:507; In re Metropolitan Railway Receivership, 208 U. S. 90; S 28:219; L 52:403; Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257; S 30:505; L 54:757; Louisville & Nashv. R. R. v. Cook Brewing Co., 223 U. S. 70; S 32:189; L 56:355.

See, now, § 757, par. 2, and Act cited.

[8]Mercelis v. Wilson, 235 U. S. 579; S 35:150; L 59:370.

[9]Arizona & New Mexico Ry. v. Clark, 235 U. S. 669; S 35:210; L 59:415.

[10]Where, after the ordinary period of Removal right has elapsed, the plaintiff discontinues against one defendant, whose co-citizenship with the plaintiff was a bar (and the sole bar) to the removal, the plaintiff is estopped to deny power of Removal. Powers v. Chesapeake & O. Ry., 169 U. S. 92; S 18:264; L 42:673. See Mackay v. Uinta Development Co., 229 U. S. 173; S 33:638; L 57:1138.

[11]Thus, after mandate from the Supreme Court to a lower Federal Court or to a State Court, the jurisdiction of such lower Court cannot be challenged, but such Court must carry the mandate into execution. Skillern's Ex'ors v. May's Ex'ors, 6 Cr. 267; L 3:220. So, McCormick v. Sullivant, 10 Wh. 192; L 6:300.

So, in general, a Federal judgment cannot be collaterally challenged for lack of jurisdiction appearing of record. Sibbald v. United States, 12 Pet. 488; L 9:1167; West v. Brashear, 14 Pet. 51; L 10:350; Stewart v. Salamon, 97 U. S. 361; L 24:1044; Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 522; S 8:217; L 31:202; Michels v. Olmstead, 157 U. S. 198; S 15:580; L 39:671; Riverdale Mills v. Manufacturing Co., 198 U. S. 188; S 25:629; L 49:1008; Kansas City Northw. R. R. v. Zimmerman, 210 U. S. 336; S 28:730; L 52:1084.

[12]Robb v. Vos, 155 U. S. 13; S 15:4; L 39:52.

Where a (State Court's) judgment (such in form) was void, but the judgment debtor named therein collaterally set it up in a Federal Court as valid, and obtained thereby an advantage as against the judgment creditor named, the judgment debtor named was estopped to deny validity of the judgment, in a subsequent Federal suit against him upon it.[13]

Pending Appeal (by the defendant below) from a Federal judgment, the plaintiff below brought, in a State Court, a new suit against the same defendant, upon the same cause of action, and was there defeated. She was thereby estopped from availing herself of the Federal judgment (favorable to her).[14]

Procedure in a State Court, for benefits under a State statute, is ordinarily operative as an Estoppel to assert Federal unconstitutionality of colorable State Written law as a ground of Federal Original Jurisdiction.[15]

Where, in a State Court, the defendant, challenging jurisdiction, upon a Federal ground, nevertheless takes advantage of State practice, under which, upon giving bond, goods attached are released, he thereby waives his right of pursuing, in a Federal Court, his such challenge.[16]

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[13]Davis v. Wakelee, 156 U. S. 680; S 15:555; L 39:578.

[14]Bryar v. Campbell, 177 U. S. 649; S 20:794; L 44:826.

[15]Newburyport Water Co. v. Newburyport, 193 U. S. 561; S 24:553; L 48:795.

[16]Cincinnati etc. Ry. v. Slade, 216 U. S. 78; S 30:230; L 54:390.

BOOK X.

FEDERAL APPELLATE JUDICIAL PROCEDURE.

PART I.—PRINCIPLES OF GENERAL CHARACTER.

PART II.—FEDERAL JUDICIAL REVIEW OF STATE JUDICIAL ACTION.

PART III.—JUDICIAL REVIEW AS AMONG FEDERAL COURTS.

PART I.

PRINCIPLES OF GENERAL CHARACTER.

CHAPTER CXLVIII.

FEDERAL APPELLATE JURISDICTION:—GENERAL VIEW.[1]

§ 785. Potential Scope.

1. The Judiciary Article of the Constitution deals in terms—although only in a broad and general way—with Appellate Jurisdiction of the Supreme Court,[2] but makes no reference to potential Appellate Jurisdiction of "inferior" Courts of the United States,[3] thereby leaving the latter field wholly to the discretion of Congress.

2. The term "appellate" is used, in the Judiciary Article, in the broad sense of "revisory," including Review by Mandamus, Prohibition, Habeas Corpus, and the like.[4]

3. The Seventh Amendment places a limitation upon Federal Appellate Jurisdiction in respect of verdicts (Federal or State) in Common Law causes.[5]

§ 786. Appellate Jurisdiction of the Supreme Court: —General View.[6]

The potential scope of the Appellate Jurisdiction of the

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[1]The term "Appellate" being here used in the broad sense of the term in the Judiciary Article, to include Appeal, Error, and other Revisory Procedure. See below.

[2]In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

[3]As, the present Jurisdiction of the Circuit Courts of Appeals.

[4]See succeeding sections of the present chapter, and §§ 795, 816, 817.

[5]In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

See §§ 658, 659.

[6]Const., Art. III:—

> * * * appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make.

As to limitations of the Appellate power, as to "fact", by the Seventh Amendment, see § 785, par. 3.

Supreme Court is not (like the Original Jurisdiction of that Court) specifically and inflexibly fixed by the Constitution, but is of broad and general potential scope, in the discretion of Congress; and—at least unless Congress should not act at all in this field,[7]—is fixed and defined by Congressional legislation.[8]

The Supreme Court may be vested with Appellate Jurisdiction over Federal Courts of any class; as, over a Court of private land-claims, held in a Federal area;[9] over Courts of Federal areas,[10] and over Federal Executive Officials, in respect of determination by them of questions of law.[11]

Congress has assumed power of excluding Appellate Jurisdiction (of the Supreme Court)over particular questions, even in a field in which, in general, such Jurisdiction is granted.[12]

It is within the power of the Supreme Court to order preservation of status quo, pending Appellate Procedure before that Court.[13]

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[7]The suggestion has been made that in the absence of all Congressional provision in the matter, the Supreme Court would have actual Appellate Jurisdiction, under rules to be made by it. Durousseau v. United States, 6 Cr. 307, 313; L 3:232; Ex parte McCardle, 7 Wall. 506, 513; L 19:264.

[8]Murdock v. Memphis, 20 Wall. 590, 620; L 22:429; St. Louis Iron Mtn. etc. Ry. v. Taylor, 210 U. S. 281, 292; S 28:616; L 52: 1061; Wiscart v. D'Auchy, 3 Dal. 321; L 1:619; American Construction Co. v. Jacksonville Ry., 148 U. S. 372, 378; S 13:158; L 37:486; Colorado Centr. Min'g Co. v. Turck, 150 U. S. 138; S 14:35; L 37:1030; United States v. American Bell Tel. Co., 159 U. S. 548, 549; S 16:69; L 40:255; United States v. Keitel, 211 U. S. 370, 397, 398; S 29:123; L 52:230.

Repeal of an Act of Congress providing for Appellate Jurisdiction in the Supreme Court, in a certain field, is a negative, pro tanto, of such Jurisdiction, and operates as one of "such exceptions" contemplated by the Constitution. Ex parte McCardle, cited above.

[9]United States v. Coe, 155 U. S. 76; S 15:16; L 39:76.

[10]Garrozi v. Dastas, 204 U. S. 64; S 27:224; L 51:369. Many other cases.

[11]§§ 715-717.

[12]See Georgia v. Stanton, 6 Wall. 50; L 18:721; and Act of Congress therein cited.

[13]Omaha etc. Street Ry. v. Interstate Com. Comm., 222 U. S. 582; S 32:833; L 56:324; (the relief, in this case, being conditioned upon giving bond).

§ 787. **Review Otherwise than by Appeal or Error.**

In respect of Review by Procedure other than by Appeal or Error, the Federal law follows the Common Law conception and practice,—Congressional legislation being construed from that point of view.[14]

§ 788. **Consent, Waiver and Estoppel as Affecting Federal Appellate Jurisdiction.**[15]

Federal Appellate Jurisdiction cannot be vested by mere consent or agreement of parties.[16]

Illustration of Waiver and Estoppel as operative adversely to Federal Appellate Jurisdiction may be presented as follows:—

Flight of a convicted person, pending Error, is a waiver of, and estops him from, right to pursue the Appellate remedy.[17]

A party in a State Court suit, successfully contending for a limitative view of the subject-matter in controversy, and thereby defeating (by limitation of amount in controversy) Federal Appellate Jurisdiction, is estopped, in a later State Court suit, to assert, by Error to the Supreme Court of the United States, (for purposes of res judicata), a broader view of the original subject-matter in controversy.[18]

One who relies, in a suit, upon a certain judgment, is estopped thereby to raise, upon Federal Error, lack of jurisdiction on the part of the Court which rendered the judgment so relied upon.[19]

§ 789. **Certain Other Particulars.**

Other particulars may be referred to, as follows:—

Upon an equal division, in an Appellate Federal Court,

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[14]§§ 795; 816, 817.

[15]As to Consent, Waiver, and Estoppel, in respect of the Federal Original Common Law and Equity Jurisdiction, see §§ 740; 782-784.

[16]Washington County v. Durant, 7 Wall. 694; L 19:164; Fraenkl v. Cerecedo, 216 U. S. 295; S 30:322; L 54:486.

See Moot Case; Amicable Suit.

[17]Bonahan v. Nebraska, 125 U. S. 692; S 8:1390; L 31:854 (Error to a State Court).

[18]Leonard v. Vicksburg etc. R. R., 198 U. S. 416; S 25:750; L 49:1108.

[19]Tilt v. Kelsey, 207 U. S. 43; S 28:1; L 52:95 (Error to a State Court).

the result is a decree of affirmance of the judgment below;[20] but the decision is not a Precedent.[21]

When it is desired to have ultimate Judicial Review of legal aspects of action of Executive officials, requests for rulings should be presented to such officials; and their rulings should be made matter of record by them.[22]

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[20]Albany Bridge Case, 2 Wall. 403; L 17:876; Durant v. Essex County, 7 Wall. 107; L 19:154; Rice v. United States, 122 U. S. 611; S 7:1377; L 30:793. See Gilman v. Philadelphia, 3 Wall. 713, 721; L 18:96.

[21]Hertz v. Woodman, 218 U. S. 205; S 30:621; L 54:1001.

[22]Chicago, B. & Q. Ry. v. Babcock, 204 U. S. 585; S 27:326; L 51:636.,

Act of Sept. 6, 1916 (39 Stats. 727), § 6:—

> That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of: Provided, That writs of certiorari addressed to the Supreme Court of the Philippine Islands may be granted if application therefor be made within six months.

CHAPTER CXLIX.

Federal Appeal and Error, Generally.[1]

§ 790. Adoption of General Common Law Principles.

In respect of Appeal and Error, the Federal Judiciary legislation tacitly recognizes, and adopts in general, the Common law principles and practice, (in the broad sense of the term Common Law).

Illustration of this proposition may be presented as follows:—

Upon Appeal and Error, only assigned Errors are, in general, open for Review;[2] and, generally, a point cannot be raised for the first time upon Error or Appeal.[3]

If one entitled to cross-appeal fails to take it, correctness is assumed as against him.[4]

A judgment of Reversal is, in general, final only upon points actually considered.[5]

The feature of Color (of Merit, in a legal contention), is recognized. Thus, where right of Removal had been specifically based, in the Removal petition, solely upon diversity of citizenship, but the record disclosed right of Removal by Federal question, the fact of specific reliance, in the Removal petition, upon diversity of citizenship, gave Color (although not effectuality) to a motion in an Appellate Court to dismiss for lack of jurisdiction.[6]

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[1]"Generally": i. e., both inter-Federal, and Federal-State.

As to Appellate Review otherwise than by Appeal or Error, see preceding chapter.

As to limitation in respect of Congressionally incorporated railroads, see § 682, par. 9, note.

[2]Hubbard v. Tod, 171 U. S. 474; S 19:14; L 43:246; many other cases.

[3]Honolulu Transit Co. v. Wilder, 211 U. S. 144; S 29:46; L 53:124; many other cases.

[4]McDonough v. Dannery, 3 Dal. 188; L 1:563; Chittenden v. Brewster, 2 Wall. 191; L 17:839; Mail Co. v. Flanders, 12 Wall. 130; L 20:249; Field v. Barber Asphalt Co., 194 U. S. 618; S 24:784; L 48:1142.

[5]Mutual L. Ins. Co. v. Hill, 193 U. S. 551; S 24:538; L 48:788.

[6]Union Pac. Ry. v. Harris, 158 U. S. 326; S 15:843; L 39:1003.

We may refer, also, for illustration, to the Federal principles governing solidarity or separability of parties, for Appeal or Error;[7] to availability of Appeal or Error, in general, to a party relying, in the lower Court, on illegality as a defence;[8] to the distinction, for Appeal or Error, between Common Law and Equity;[9] to maintenance of status quo, pending Appeal or Error;[10] to availability, in general, of Appeal or Error, only in respect of final judgment,[11] even where (as in Judicial Code, § 238) Congressional text is not specific to that effect;[12] to definition of final judgment, for this purpose;[13] to freedom of action of the lower Court, in an aspect or feature not dealt with by Appeal or Error;[14] to inoperativeness of Appeal or Error (and of judgment thereunder) as against a suitor not made a party to the Appeal or Error;[15] and to the duty of the

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[7]Hanrick v. Patrick, 119 U. S. 156; S 7:147; L 30:396; Smith Purifier Co. v. McGroarty, 136 U. S. 237; S 10:1017; L 34:346; Winters v. United States, 207 U. S. 564; S 28:207; L 52:340; Garcia v. Vela, 216 U. S. 598; S 30:439; L 54:632.

[8]Nutt v. Knut, 200 U. S. 12; S 26:216; L 50:348; Sage v. Hampe, 235 U. S. 99; S 35:94; L 59:147.

[9]Brewster v. Wakefield, 22 How. 118; L 16:301; Walker v. Dreville, 12 Wall. 440; L 20:429; Marin v. Lalley, 17 Wall. 14; L 21:596; Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638; S 20:824; L 44:921; Behn v. Campbell, 205 U. S. 403; S 27:502; L 51:857.

[10]Cotting v. Kansas City Stock Yards, 183 U. S. 79; S 22:30; L 46:92.

[11]McLish v. Roff, 141 U. S. 661; S 12:118; L 35:893; Heike v. United States, 217 U. S. 423; S 30:539; L 54:821; many other cases.

[12]McLish v. Roff, cited above; American Construction Co. v. Jacksonville etc. Ry., 148 U. S. 372; S 13:158; L 37:486; Kirwan v. Murphy, 170 U. S. 205, 209; S 18:592; L 42:1009; Ex parte National Enameling Co., 201 U. S. 156; S 26:404; L 50:707; Heike v. United States, 217 U. S. 423, cited above.

Certain exceptional Congressional texts, in terms dispense with the requirement of final judgment as a condition of Appeal or Error, e. g., Jud. Code, § 252 (Bankruptcy), as possibly affected (see our sections 842-845) by later Congressional legislation.

[13]Cases last above cited; many other cases.

[14]Fuller v. United States, 182 U. S. 562; S 21:871; L 45:1230; (new trial for newly discovered evidence).

[15]In re Metropolitan Trust Co., 218 U. S. 312; S 31:18; L 54:1051.

lower Court, after Mandate, to allow such Amendments as are necessary to give effect to theMandate.[16]

Action of the lower Court, under an Appellate Mandate, may give rise to further Appellate right,[17] but not where the action of the lower Court is pursuant to, and is conformable to, the Mandate.[18]

§ 791. Defendant Below, (as Appellant or Plaintiff in Error), as Still a Defendant, to Certain Intents.

A defendant below still remains a defendant, to certain intents, while appellant or plaintiff in Error.[19]

The proposition is illustrated in the doctrine that one setting up, below, in defence, illegality on the part of himself as also of the plaintiff below, may, upon failure of his defence below, have Error upon it.[20]

§ 792. Appellant or Plaintiff in Error, as a Plaintiff.

In various respects, however, an appellant or a plaintiff in Error is, in the Appellate Procedure, on the footing of a plaintiff. Thus, the burden is upon him of showing, upon his Appellate record, and of establishing, error in the judgment below.[21]

§ 793. Pendency of Appellate Procedure as not Suspensive of Substantive Law.

A party seeking or enjoying the benefit of Appellate Procedure does not, in general, thereby gain immunity, pending such effort or such Procedure, from continuance of operation of Substantive law in question, but proceeds at his peril in a course of action the lawfulness of which is in question; and, if judgment ultimately goes against him,

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[16]United States v. Lehigh Valley R. R., 220 U. S. 257; S 31:387; L 55:458.

[17]Walden v. Bodley's Heirs, 9 How. 34; L 13:36; Mackall v. Richards, 112 U. S. 369; S 5:170; L 28:737; United States v. Lehigh Valley R. R., cited above.

[18]Rio Grande Western Ry. v. Stringham, 239 U. S. 44; S 36:5; L 60:136.

[19]Cohens v. Virginia, 6 Wh. 264; L 5:257.

[20]Nutt v. Knut, 200 U. S. 12; S 26:216; L 50:348; Sage v. Hampe, 235 U. S. 99; S 35:94; L 59:147.

[21]Ex parte Nebraska, 209 U. S. 436; S 28:581; L 52:876.

is accountable for action taken by him pending such effort or such Procedure.[22]

The principle is subject to the qualification that the Substantive law in question must not be, in character, violative of principles of Due Process of Law, by undertaking, in effect, to bar the party in question from exercise of a right to which he is entitled, in the situation in question, of Appellate Jurisdiction.[23]

§ 794. Presence of Defendant in a Criminal Cause.

Presence in Court of the defendant below, in a Criminal cause, is not required, in Federal Appellate Procedure.[24]

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[22]Ex parte Young, 209 U. S. 123; S 28:441; L 52:714; Missouri Pac. Ry. v. Larabee, 234 U. S. 459; S 34:979; L 58:1398 (Error to a State Court).

[23]As in the case of State law providing for rapidly accumulating penalties, prohibitory in character and in amount, of resort to Federal Appellate Review. See Due Process as matter of Procedure (§§ 557-567).

[24]Dowdell v. United States, 221 U. S. 325; S 31:590; L 55:753.

PART II.

FEDERAL JUDICIAL REVIEW OF STATE JUDICIAL ACTION.

CHAPTER CL.

OTHERWISE THAN BY WRIT OF ERROR:—CERTIORARI.

§ 795. The Subject Generally.

1. The Congressional texts dealing with Appellate Jurisdiction of the Supreme Court over State Courts, do not provide in terms for exercise of that Jurisdiction by way of Mandamus; Common Law Certiorari,[1] or Prohibition; and those writs appear not to lie for such Appellate purpose.[2]

2. The Congressional Judiciary legislation does not provide for Appeal from State Courts, in the strict sense of the term "Appeal"; but, as between Appeal and Error, provides only for Error.[3]

3. By force of the general Congressional Habeas Corpus legislation, the Supreme Court may exercise what is in effect Appellate Jurisdiction over the State Courts, by Habeas Corpus issuing directly from the Supreme Court.[4]

Actual exercise, however, of such Appellate Jurisdiction, in this form, is subject[5] to limitations of general character; and is, in practice, highly exceptional.[6]

4. Broad Appellate Review, (discretionary with the Supreme Court), by statutory Certiorari, is provided for by recent Amendment of the Judicial Code.[7]

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[1]See par. 4, below as to statutory Certiorari.

[2]Chesapeake & O. R. R. v. White, 111 U. S. 134; S 4:353; L 28:378; In re Green, 141 U. S. 325; S 12:11; L 35:765; In re Blake, 175 U. S. 114; S 20:42; L 44:94.

[3]As to issues of fact, upon Writ of Error, see § 802.

[4]Ex parte Crouch, 112 U. S. 178; S 5:96; L 28:690; Ex parte Fonda, 117 U. S. 516; S 6:848; L 29:994; In re Eckart, 166 U. S. 481; S 17:638; L 41:1085; Ex parte Spencer, 228 U. S. 652; S 33:709; L 57:1010.

[5]Cases last cited.

[6]Cases last cited.

[7]Jud. Code, § 237, as Amended by Act of Dec. 23, 1914 (38 Stats. 790); as further Amended by Act of Sept. 6, 1916 (39 Stats. 726) § 2:—

* * * [Writ of Error to a State Court: as to which see our Chapter CLI, (§ 796-813)].

It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and

The words "or otherwise," in Code section 237, seem to be surplusage,—as in the case of the text dealing with Certiorari to the Circuit Court of Appeals.[8]

The closing clause of Code section 237, (beginning: "or where any title, right, privilege, or immunity)," was—even when it lacked the words "either in favor of, or"—a mere variant of the usual broad Federal Question expression: "arising under the Constitution, a treaty, or the laws of the United States" (in one or in another precise form of words).[9]

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determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity, especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority.

As to the expression "an authority exercised under the United States"; and, in particular, as to the question of limitative operation thereon, of general principles of Federal Question, see §§ 681-684.

[8] § 489 and case cited.

[9] Boyd v. Thayer, 143 U. S. 135; S 12:375; L 36:103; (Federal citizenship as a privilege, etc., although a condition of State office).

Railroads v. Richmond, 15 Wall. 3; L 21:118; Belden v. Chase, 150 U. S. 674; S 14:264; L 37:1218; California Bank v. Kennedy, 167 U. S. 362; S 17:831; L 42:198; Missouri, Ks. & Tex. Ry. v. Elliott, 184 U. S. 530; S 22:446; L 46:673; Nutt v. Knut, 200 U. S. 12; S 26:216; L 50:348; Cornell Stmbt. Co. v. Phœnix Construction Co., 233 U. S. 593; S 34:701; L 58:1107. Obiter remarks to the contrary in Allen v. Arguimbau, 198 U. S. 149; S 25:622; L 49:990 (dismissed for lack of jurisdiction, upon a ground not here in question), are inconsistent with the cases above cited, and particularly with the closely succeeding case of Nutt v. Knut, cited above. Walworth v. Kneeland, 15 How. 348; L 14:724; presenting a result opposite to that of Nutt v. Knut, was under the narrower Act of 1789. In Udell v. Davidson, 7 How. 769; L 12:907, it was the plaintiff below, not the defendant below, that relied upon his own fraud, a situation generically different from that of Nutt v. Knut.

See, also, cases cited below.

A fortiori, is such the case now.[10]

[10]It may be proper to allude to a controversy, formerly existing, as to (or primarily as to) this clause as it stood, (then dealing with Writ of Error, and lacking the words "either in favor of or" near the end) prior to the Act of Sept. 6, 1916, cited above.

Over a long period, beginning at least as early as the year 1816, (cases cited below), an attempt was made to give effect to the term "specially" (later, and now, "especially") by giving it the meaning: "first in point of time"; or "first in order of events"; and, thereby, by viewing an opposing contention (inherently within the subject-matter scope of the text), as a collateral, not a special claim; and this in case not merely (a) of mere contradiction of the initial contention, but (b) of counter-contention, of fresh and distinct Federal character (Montgomery v. Hernandez, 12 Wh. 129; L 6:575; Commonwealth Bank of Kentucky v. Griffith, 14 Pet. 56; L 10:352; Fulton v. McAffee, 16 Pet. 149; L 10:918; Strader v. Baldwin, 9 How. 261; L 13:130; Ryan v. Thomas, 4 Wall. 603; L 18:460; Manning v. French, 133 U. S. 186; S 10:258; L 33:582; Missouri v. Andriano, 138 U. S. 496; S 11:385; L 34:1012; Jersey City & Bergen R. R. v. Morgan, 160 U. S. 288; S 16:276; L 40:430; Abbott v. Tacoma Bank, 175 U. S. 409; S 20:153; L 44:217; DeLamar's Min'g Co. v. Nesbitt, 177 U. S. 523; S 20:715; L 44:872; Baker v. Baldwin, 187 U. S. 61; S 23:19; L 47:75); without, however, during the period of the cases cited above, entire uniformity of decision in this respect. (Mager v. Grima, 8 How. 490; L 12:1168; Johnson v. Towsley, 13 Wall. 72; L 20:485; Baldwin v. Stark, 107 U. S. 463; S 2:473; L 27:526; Metropolitan Bank v. Claggett, 141 U. S. 520; S 12:60; L 35:841). This interpretation gradually became, however, more and more burdensome, and more and more conspicuously unpractical, and was finally decisively rejected. St. Louis, Iron Mtn. etc. Ry. v. Taylor, 210 U. S. 281; S 28:616; L 52:1061; Miller v. New Orleans Acid etc. Co., 211 U. S. 496; S 29:176; L 53:300; Creswill v. Knights of Pythias, 225 U. S. 246; S 32:822; L 56:1074; St. Louis, Iron Mtn. etc. Ry. v. McWhirter, 229 U. S. 265; S 33:858; L 57:1179; (see, in the latter case, dissenting Opinion, pointing out the change in Judicial decision); Straus v. American Publishers' Ass'n, 231 U. S. 222; S 34:84; L 58:192; all, in effect, following and adopting the doctrine of Metropolitan Bank v. Claggett, cited above.

CHAPTER CLI.

WRIT OF ERROR TO A STATE COURT.[1]

§ 796. Requirement of Exhaustion of State Remedies, Judicial or Non-Judicial:—And in Proper Sequence.

1. GENERALLY.—The Federal law imposes the reasonable and practical requirement that a plaintiff in Error must have exhausted all available and practical remedies open to him under State law, whether such remedies be of Judicial, or of non-Judicial, character.

In the field of Judicial remedy, the principle is illustrated in Federal requirement of exercise of State Ap-

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[1]Jud. Code, § 237, as Amended by Act of Dec. 23, 1914 (38 Stats. 790); as further Amended by Act of Sept. 6, 1916 (39 Stats. 726) § 2:—

> A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ. [A Certiorari clause follows: as to which see our § 795, par. 4.]

Act last above cited, § 4:—

> That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed.

As to the expression "an authority exercised under the United States"; and, in particular, as to the question of limitative operation, thereon, of general principles of Federal question, see §§ 681-684. See also § 795, par. 4.

pellate right,[2] even if addressed only to the discretion of the Appellate Court;[3] and without regard to the probability of actual benefit therefrom.[4]

In the field of non-Judicial remedy, the principle is illustrated in Federal requirement of objection before Tax officials competent by State law to consider the objection;[5] and, of resort to State Executive Revisory officials.[6]

2. PROPER SEQUENCE.—Federal requirement of proper order or sequence in resort to State remedies, is illustrated in the Federal requirement of Judicial challenge (where available under State Procedure) of an Administrative Order, at the threshold, rather than by defence, in a suit for a penalty under the Order.[7]

§ 797. "Final" (Judgment or Decree).

The term "final" (judgment or decree) in the text in question, is employed in the Common Law sense.

It is not subject, in this respect, to qualification, for the purpose of Federal Error, by State Procedure law.[8]

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[2]Fisher v. Perkins, 122 U. S. 522; S 7:1227; L 30:1192; Great Western Telegr. Co. v. Burnham, 162 U. S. 339; S 16:850; L 40:991; Mullen v. Western Union Beef Co., 173 U. S. 116; S 19:404; L 43:635.

[3]Stratton v. Stratton, 239 U. S. 55; S 36:26: L 60:142.

[4]Great Western Telegr. Co. v. Burnham, cited above, where, under the State practice, the question, having been once passed upon in the same case, was foreclosed, although with jurisdiction of it, by the State Appellate Court.

[5]Hibben v. Smith, 191 U. S. 310; S 24:88; L 48:195.

[6]Stanley v. Supervisors of Albany, 121 U. S. 535; S 7:1234; L 30:1000; Beeson v. Johns, 124 U. S. 56; S 8:352; L 31:360; Osborne v. San Diego Co., 178 U. S. 22; S 20:860; L 44:961; Western Un. Tel. Co. v. Gottlieb, 190 U. S. 412; S 23:730; L 47:1116; Prentis v. Atlantic Coast Line, 211 U. S. 210; S 29:67; L 53:150; Mellon Co. v. McCafferty, 239 U. S. 134; S 36:94; L 60:181.

[7]Wadley Southern Ry. v. Georgia, 235 U. S. 651; S 35:214; L 59:405.

[8]Thus, when State practice allows one under indictment to raise, by habeas corpus, the validity in law of the indictment, a judgment adverse to him in the habeas corpus proceeding is not a final judgment for Federal Error: there being no final judgment to that end until after conviction in the main case. Bailey v. Alabama, 211 U. S. 452; S 29:141; L 53:278.

§ 798. **The United States as Plaintiff in Error (in Error to a State Court).**

The United States, when it elects to be a suitor in a State Court, has no peculiar right to Error to the State Court, but stands, in that respect, like a private suitor.[9]

§ 799. **Non-Competency of a State as Plaintiff in Error.**

Where a State has submitted itself to the jurisdiction of one of its own Courts, it cannot have Federal Error to review an adverse judgment.[10]

§ 800. **Exhaustiveness, in Respect of Classes of Suits.**

The Congressional provision draws no distinction as among different classes of suits in State Courts, but applies indifferently to all classes of suits: as, to a State habeas corpus proceeding.[11]

The optional Common Law remedy, upon causes of action of Admiralty and Maritime character[12] does not exempt State judgments in that field from Federal Review, but leaves them subject to such Review on the footing of State judgments in general.[13]

§ 801. **The Particular State Court.**

1. In its definition of the class of State Courts to which Error may run, the text above cited accepts the Judiciary policy of the States severally, and does not require, as a basis of Federal Error, a decision by a State Court of high plane; but it is sufficient, for Federal Review—from the standpoint of character or plane of the State Court,—that no Review, by a higher State Court, was open.[14]

It is immaterial how it comes about that a particular State Court, in which final judgment is rendered, is the highest Court of the State in which it was open to the

[9]United States v. Thompson, 93 U. S. 586; L 23:982. (In this case the United States appeared in the State Court as an intervenor; but the case would seem to support the full proposition of our text).

[10]Braxton County Court v. West Virginia, 208 U. S. 192; S 28: 275; L 52:450.

[11]Hatch v. Reardon, 204 U. S. 152; S 27:188; L 51:415; Bailey v. Alabama, 211 U. S. 452; S 29:141; L 53:278.

[12]See Admiralty, § 527.

[13]Belden v. Chase, 150 U. S. 674; S 14:264; L 37:1218.

[14]Missouri, Ks. & Tex. Ry. v. Cade, 233 U. S. 642; S 34:678; L 58: 1135: (Error to a Justice's Court).

plaintiff in Error to present the question sought to be presented by Federal Error. For example, limitation, in a particular State, of Appellate Jurisdiction by amount in controversy, has no operation adverse to Federal Error; but the Federal writ runs to the lower State Court.[15]

So, where, for any cause, State Judicial Review is denied by the State Appellate Judiciary.[16]

Where assumption of jurisdiction by a State Appellate Court does not affirmatively and distinctly appear, absence of Appellate Jurisdiction is assumed, by the Supreme Court of the United States, and Error runs to the lower State Court.[17]

2. Error runs to the State Court (of higher or of lower plane) in and by which final judgment is rendered, regardless (where the Court is of lower plane) of the fact of Review, by a higher Court, of questions arising in the cause. Where, for example, (or as far as), by State Practice, there are presented to an Appellate Court only questions of law, (as, by a Bill of Exceptions); and a mere order is transmitted by that Court to the lower State Court, and judgment is entered by the latter Court, then, and in such case, the Federal Writ of Error runs to the latter Court.[18]

Where the Procedure of a particular State provides successive Appellate stages, the principles above considered are applicable mutatis mutandis.[19]

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[15]Missouri, Ks. & Tex. Ry. v. Cade, cited above: Review of a judgment for less than twenty dollars (non-reviewable by a higher State Court, by reason of the limited amount).

[16]Gregory v. McVeigh, 23 Wall. 294; L 23:156; Bacon v. Texas, 163 U. S. 207; S 16:1023; L 41:132; Western Un. Tel. Co. v. Hughes, 203 U. S. 505; S 27:162; L 51:294; Sullivan v. Texas, 207 U. S. 416; S 28:215; L 52:274; Western Un. Tel. Co. v. Crovo, 220 U. S. 364; S 31:399; L 55:498; Kanawha Ry. v. Kerse, 239 U. S. 576; S 36:174; L 60:448.

[17]Norfolk Turnpike Co. v. Virginia, 225 U. S. 264, 269; S 32:828; L 56:1082: "While, therefore", etc.

[18]McDonald v. Massachusetts, 180 U. S. 311; S 21:389; L 45:542; Rothschild v. Knight, 184 U. S. 334; S 22:391; L 46:573.

[19]Missouri, Ks. & Tex. Ry. v. Elliott, 184 U. S. 530; S 22:446; L 46:673.

As to a distinction, at least in habeas corpus cases, between a State Court and a State Judge, see Carper v. Fitzgerald, 121 U. S. 87; S 7:825; L 30:882; McKnight v. James, 155 U. S. 685; S 15:248; L 39:310.

§ 802. Issues of Fact.

The Common Law definition of Review by Writ of Error requires, in the case of Federal Error, to a State Court, a certain degree of expansion, or at least of Federal specialization, (owing to the necessity for efficient Federal protection of Federally secured rights), in respect of Federal inquiry into findings of fact (in a State Court), closely involving such rights,—particularly, although not wholly, in respect (a) of conclusions of fact, and (b) of conclusions of mixed law and fact.

Where, or in so far as, a finding is open to Federal Review upon Error, the material particulars of evidence must of necessity appear of record; and it is the duty[20] of the plaintiff in error to cause them so to appear, if he would avail himself of them.[21]

What is said below is applicable distributively: (a) to findings of pure fact; (b) to conclusions of fact; and (c) to determinations of mixed law and fact.

The controlling principles may be summarized as follows: the lines of division between different classes of cases being necessarily, from the nature of the case, more or less matter of Degree, and of Judicial discretion.

(1) Where the finding is a verdict of a jury, within the contemplation of the Seventh Amendment, the finding is, by force of that Amendment, Federally reviewable upon Error only to the extent of inquiry into the sufficiency, in character, of the evidence to support the verdict.[22]

(2) A finding not involved with an issue of Federal character or concern, is not Federally reviewable.[23]

(3) The mere fact that a finding underlies, and is de-

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[20]As it is the right: (§ 807).

[21]Williams v. Mississippi, 170 U. S. 213; S 18:583; L 42:1012; Simon v. Craft, 182 U. S. 427; S 21:836; L 45:1165; Atlantic Coast Line v. Florida, 203 U. S. 256; S 27:108; L 51:174; Seaboard Air Line v. Florida, 203 U. S. 261; S 27:109; L 51:175; Willcox v. Consolidated Gas Co., 212 U. S. 19; S 29:192; L 53:382; Northern Pac. Ry. v. North Dakota, 216 U. S. 579; S 30:423; L 54:624.

[22]See State Court Verdict (§§ 658, 659).

[23]Many cases, the principle being one of constant application. Illustration a fortiori is afforded by cases under ¶ 3, infra.

terminative of, a Federal contention, does not bring the finding within the scope of Federal Review upon Error.[24]

(4) When, however, a finding is of such character, that it closely approaches, and may substantially amount to, a determination upon a question of Federal right as such, it is Federally reviewable, upon Error.

In practice, this principle finds its most common application in respect of conclusions of fact, (as, of negligence, or of reasonableness), based upon specific facts found.[25]

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[24]Hunt v. Hunt, Appendix to 131 U. S. cxlv; L 24:1109; Eustis v. Bolles, 150 U. S. 361; S 14:131; L 37:1111; Dower v. Richards, 151 U. S. 658; S 14:452; L 38:305; Israel v. Arthur, 152 U. S. 355; S 14:585; L 38:474; Egan v. Hart, 165 U. S. 188; S 17:300; L 41:680; (findings adversely dominative of a Federal contention-in-law, of non-navigability of a stream, at a point not Judicially known to the Federal Courts); Hedrick v. Atchison, T. & S. F. R. R., 167 U. S. 673; S 17:922; L 42:320;

Forsyth v. Vehmeyer, 177 U. S. 177; S 20:623; L 44:723: (finding of fraudulent character of debt, as against a discharge in Bankruptcy);

Simon v. Craft, 182 U. S. 427; S 21:836; L 45:1165;

Bement v. National Harrow Co., 186 U. S. 70; (findings material to rights claimed under the Federal Patent laws);

Adams v. Church, 193 U. S. 510; S 24:512; L 48:769: findings (upon general Common Law principles) of an Estoppel to assert, in a State Court, a Federal right;

Chrisman v. Miller, 197 U. S. 313; S 25:468; L 49:770: findings upon issues dominative of land-title under the Federal Mining laws (gold-bearing character; location, abandonment, etc.);

Gulf, Colorado & S. F. Ry. v. Texas, 204 U. S. 403; S 27:360; L 51:540: (findings underlying definition of commerce, in a particular instance, as intrastate or not);

Rankin v. Emigh, 218 U. S. 27; S 30:672; L 54:915: (findings upon issues of general character, underlying liability, in contract, of a national bank);

Miedreich v. Lauenstein, 232 U. S. 236; S 34:309; L 58:584: findings of facts essential (as matter of Federal Due Process requirement) to the jurisdiction of the State Court in the cause in question;

Missouri, Ks. & Tex. Ry. v. West, 232 U. S. 682; S 34:471; L 58:795: (finding of status of a plaintiff as an employee of an express company, not of the defendant railroad: underlying a question of applicability of an Act of Congress).

[25]Minneapolis & St. Louis R. R. v. Minnesota, 193 U. S. 53; S 24:396; L 48:614; Schlemmer v. Buffalo etc. Ry., 205 U. S. 1; S 27:407; L 51:681; 220 U. S. 590; S 31:561; L 55:596; Atlantic Coast Line v. North Carolina Corp. Comm., 206 U. S. 1; S 27:585; L 51:933; Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655; S

It is, however, not universally so limited in application; but extends to analysis, and weighing, of evidence, upon particulars of fact.[26]

The principle is applied where the question of existence, of definition, or of particulars, (in and for the purposes of a particular situation), of a contract, or a franchise, or the like, is closely interwoven with the question of Federal Constitutional protection of rights of such class.[27]

(5) A considerable degree of presumptive weight is given to the State finding—the presumption being stronger or weaker according as the issue approaches more nearly the third, or the fourth, class of issues above considered,—[28] and to the view, as matter of law, of the State Courts, as to evidence of facts.[29]

§ 803. Federal Exclusiveness in Respect of Particulars, and of Incidents, of Error.

It is the Federal policy that the particulars, and the Incidents, of Error, in the field now in question, shall—subject to certain qualifications (considered elsewhere in this Chapter) in respect of raising of the Federal question, and of right to Error—be uniform as among the States; and, to that end, such matters are of Federal exclusive power: as, in the matter of costs, and of other like Incidents of the Error proceeding.[30]

32:389; L 56:594; Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S. 510; S 32:535; L 56:863; Carlson v. Curtiss, 234 U. S. 103; S 34:717; L 58:1237.

[26]Kansas City So. Ry. v. Albers Commission Co., 223 U. S. 573; S 32:316; L 56:556; Creswill v. Knights of Pythias, 225 U. S. 246; S 32:822; L 56:1074; St. Louis & Iron Mtn. Ry. v. McWhirter, 229 U. S. 265; S 33:858; L 57:1179; Interstate Amusement Co. v. Albert, 239 U. S. 560; S 36:168; L 60:439.

[27]State Bank v. Knoop, 16 How. 369; L 14:977; Jefferson Branch Bank v. Skelly, 1 Bl. 436; L 17:173; Bridge Prop'rs v. Hoboken Co., 1 Wall. 116; L 17:571; Delmas v. Insurance Co., 14 Wall. 661; L 20:757; Boyce v. Tabb, 18 Wall. 546; L 21:757; Powers v. Detroit, Grand Haven & Milw. Ry., 201 U. S. 543; S 26:556; L 50:860.

[28]Cases, generally, cited above.

[29]Great Northern Ry. v. Knapp, 240 U. S. 464; S 36:399; L 60:745.

[30]Missouri Pac. Ry. v. Larabee, 234 U. S. 459; S 34:979; L 58:1398: (attorney's fees, in respect of the Error procedure, not State-taxable as costs).

§ 804. Federal Interpretation of the State Court Record.

By way of Incident to its primary authority, the Federal Judiciary has, upon Error, power of Interpretation of the State Court record, in so far as is material to the Writ of Error.[31]

Where the grounds of a State Court judgment are material to Federal Error, the Supreme Court, upon Error, considers the whole record in the State Court, and not merely the form of the judgment.[32]

§ 805. Data of Federal Inquiry into the State Court's Action:—Record:—Opinion:—Not Certificate:—Record as Controlling.

1. In dealing with a Writ of Error to a State Court,—whether from the standpoint of Federal Jurisdiction of it, or from the standpoint of its Merits—the Federal Appellate Court looks not merely to the record proper, but—for light upon the record—to an Opinion delivered in the cause pursuant to the State practice;[33] but does not recognize a mere volunteer certificate, (even from the highest State Court), undertaking to qualify or to add to the record,—even though the addition or qualification be valuable to the plaintiff in Error: (as, by asserting adverse passing by the State Court, upon a Federal question.)[34]

2. As between the record proper, and an Opinion, the record controls.[35]

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[31]American Express Co. v. Mullins, 212 U. S. 311; S 29:381; L 53:525.

[32]Guardian Trust Co. v. Fisher, 200 U. S. 57; S 26:186; L 50:367.

[33]Crossley v. New Orleans, 108 U. S. 105; S 2:300; L 27:667; Welch v. Swazey, 214 U. S. 91; S 29:567; L 53:923; a great number of other cases.

[34]Yazoo & Miss. R. R. v. Adams, 180 U. S. 41; S 21:256; L 45:415; Home for Incurables v. New York, 187 U. S. 155; S 23:84; L 47:117; Fullerton v. Texas, 196 U. S. 192; S 25:221; L 49:443; Louisville & Nashv. R. R. v. Smith, 204 U. S. 551; S 27:401; L 51:612; Cleveland & Pittsburgh R. R. v. Cleveland, 235 U. S. 50; S 35:21; L 59:127.

[35]Thus, it may appear from the record that a Federal question, raised in the State Court, was necessarily passed upon adversely by the State Court judgment, although not dealt with in the Opinion; and, in such situation, Federal Error lies. West Chicago R. R. v. Chicago, 201 U. S. 506; S 26:518; L 50:845; Schlemmer v. Buffalo etc. Ry., 205 U. S. 1; S 27:407; L 51:681; 220 U. S. 590; S 31:

3. As for other Federal purposes, in general,[36] a State Judicial Opinion is interpreted, for this purpose, in the light of earlier Judicial Precedent of the State.[37]

§ 806. **Decision Below upon a Non-Federal Ground.**

If the State Court's judgment is capable of being rested, and was, by the State Judiciary, rested, upon a non-Federal ground, a Federal question raised in the State Courts becomes, for purposes of Federal Error, immaterial; and a Federal Writ of Error is not maintainable upon it.[38]

§ 807. **Raising of the Federal Question, in the State Courts.**

We have considered above[39] the general requirement of presentation of a contention in the Court below, as a condition of Error. Application of the principle, in the particular field now in question, may be presented as follows:—

(1) The burden (a) of raising, in the State Court, of a Federal question, and (b) of causing the Federal question to appear upon the record, for the Supreme Court, is upon the party seeking relief by Error.[40]

561; L 55:596; Olmsted v. Olmsted, 216 U. S. 386; S 30:292; L 54:530; Gaar, Scott & Co. v. Shannon, 223 U. S. 468; S 32:236; L 56:510; Wood v. Chesborough, 228 U. S. 672; S 33:706; L 57:1018; Holden Land Co. v. Inter-State Trading Co., 233 U. S. 536; S 34:661; L 58:1083; Missouri, Ks. & Tex. Ry. v. Cade, 233 U. S. 642; S 34:678; L 58:1135; Manhattan L. Ins. Co. v. Cohen, 234 U. S. 123; S 34:874; L 58:1245; Toledo, St. L. & W. R. R. v. Slavin, 236 U. S. 454; S 35:306; L 59:671.

[36]See Following State Judicial Decisions (§§ 688-696).

[37]Welch v. Swazey, cited above; many other cases.

[38]Adams County v. Burlington & Mo. R. R., 112 U. S. 123; S 5:77; L 28:678; Eustis v. Bolles, 150 U. S. 361; S 14:131; L 37:1111; Adams v. Russell, 229 U. S. 353; S 33:846; L 57:1224; Missouri, Ks. & Tex. Ry. v. West, 232 U. S. 682; S 34:471; L 58:795; New Orleans & Northeast. R. R. v. National Rice Co., 234 U. S. 80; S. 34:726; L 58:1223; many other cases.

Where there is a Federal question, thus immaterial, but also a material Federal question, Federal Error, of course, lies; but only the material Federal question is dealt with: as, in Mobile etc. R. R. v. Mississippi, 210 U. S. 187; S 28:650; L 52:1016; Berea College v. Kentucky, 211 U. S. 45; S 29:33; L 53:81.

[39]Appeal and Error, Generally, (§§ 790-794).

[40]Rogers v. Alabama, 192 U. S. 226; S 24:257; L 48:417; Stickney v. Kelsey, 209 U. S. 419; S 28:508; L 52:863; many other cases.

(2) There is an absolute Federal right of raising, in a State Court, in some form, and at some stage, a Federal question for, and in a manner apt to, ultimate Federal Error.[41]

(3) For the purposes of Federal Error, each Federal question stands by itself; and the raising, in the State Court, of one question, does not open the door, upon Federal Error, to other questions.[42]

(4) When a question of Federal policy is involved, failure to raise a question in the State Courts is not necessarily fatal to Federal Error.[43]

(5) Subject to the principles above stated, (of Federal right of raising Federal questions), the mode and the stage of raising a Federal question must have been such as are provided and prescribed by the State Procedure law; as, in the case of State requirement: (a) of plea in abatement to the array of a grand jury;[44] (b)of assignment, for a State Appellate Court, of Errors proposed to be relied upon; and of insistence, in argument, upon Errors assigned;[45] (c) of appeal within a certain reasonable time;[46] (d) or bringing in material parties.[47]

(6) Right of Federal Review may depend upon (and may be limited by) the State-provided nature and particulars of a suit in question.[48]

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[41]§ 727, ¶¶ 7, 8, and cases cited; Chesapeake & O. Ry. v. McCabe, 213 U. S. 207; S 29:430; L 53:765; cases generally, cited in the present section.

See also §§ 661-663.

[42]Keokuk Bridge Co. v. Illinois, 175 U. S. 626; S 20:205; L 44: 299; Cox v. Texas, 202 U. S. 446; S 26:671; L 50:1099; Heyman v. Southern Ry., 203 U. S. 270; S 27:104; L 51:178; Haire v. Rice, 204 U. S. 291; S 27:281; L 51:490.

[43]Atlantic Coast Line v. Burnette, 239 U. S. 199; S 36:75; L 60: 226; (failure of the defendant below to press, in the State Courts, the defence of the Congressional special Statute of Limitations applicable to suit under the Congressional Employers' Liability legislation).

[44]Tarrance v. Florida, 188 U. S. 519; S 23:402; L 47:572.

[45]Hulbert v. Chicago, 202 U. S. 275; S 26:617; L 50:1026.

[46]E. g., from denial of Removal; Chesapeake & O. Ry. v. McDonald, 214 U. S. 191; S 29:546; L 53:963.

[47]John v. Paulin, 231 U. S. 583; S 34:178; L 58:381.

[48]Thus, where as matter of privilege, a private person may sue as Relator, in the name of the State, power of Appeal or Error may, for

(7) In so far as State Procedure does not allow a greater latitude, the Federal question must, for Federal Error, be raised in the State Courts at the earliest opportunity: (as, in the trial Court, and not, for the first time, in an Appellate Court);[49] not, for the first time, at a second trial following a reversal judgment of a State Appellate Court;[50] nor upon motion for new trial;[51] nor by motion to Amend, addressed (under State practice) to the discretion of the State Court;[52] nor upon petition for re-hearing, before an Appellate Court;[53] nor upon a second Appeal to a State Court;[54] nor on motion in arrest of judgment, or the like;[55] nor, for the first time, in a secondary suit, if it was capable of being raised in the primary suit.[56] A fortiori, a Federal question cannot be raised for the first time by assignment in the Federal Writ of Error.[57]

This principle applies according to the nature of a particular situation. Thus, if a Federal right arises for the first time pending the suit in the State Courts, it may be

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State and for Federal Error, be put within the exclusive discretion of the State, as plaintiff below. Bolens v. Wisconsin, 231 U. S. 616; S 34:272; L 58:400.

[49]Bushnell v. Crooke Min'g Co., 148 U. S. 682; S 13:771; L 37:610; Erie R. R. v. Purdy, 185 U. S. 148; S 22:605; L 46:847.

[50]Yazoo & Miss. R. R. v. Adams, 180 U. S. 1; S 21:240; L 45:395; Supply Co. v. Light & Power Co., 197 U. S. 299; S 25:481; L 49:765.

[51]Louisville & Nashv. R. R. v. Woodford, 234 U. S. 46; S 34:739; L 58:1202; Keen v. Keen, 201 U. S. 319; S 26:494; L 50:772.

[52]Louisville & Nashv. R. R. v. Higdon, 234 U. S. 592; S 34:948; L 58:1484.

[53]Eastern Bldg. Ass'n v. Welling, 181 U. S. 47; S 21:531; L 45:739; McMillen v. Ferrum Min'g Co., 197 U. S. 343; S 25:533; L 49:784; Corkran Oil Co. v. Arnaudet, 199 U. S. 182; S 26:41; L 50:143; McCorquodale v. Texas, 211 U. S. 432; S 29:146; L 53:269; Waters-Pierce Oil Co. v. Texas, (No. 2), 212 U. S. 112; S 29:227; L 53:431; Forbes v. State Council, 216 U. S. 396; S 30:295; L 54:534.

[54]Bonner v. Gorman, 213 U. S. 86; S 29:483; L 53:709.

[55]Manley v. Park, 187 U. S. 547; S 23:208; L 47:296.

[56]Loeber v. Schroeder, 149 U. S. 580; S 13:934; L 37:856.

[57]Manhattan L. Ins. Co. v. Cohen, 234 U. S. 123; S 34:874; L 58:1245; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291; S 23:375; L 47:480.

presented (in the State Courts), when it arises and is first capable of being presented.[58]

(8) The Federal question must have been raised (in the State Court), with sufficient particularity to bring it to the attention of the State Court.[59] Thus, where a certain text is common to the Constitution of the United States and the Constitution of the State in question, distinction must be specifically made, if it is the Constitution of the United States that is relied upon.[60]

(9) The Federal requirements above considered[61] are based upon the considerations: (a) of proper regard to State Procedure; and (b) of protection of Federal Error from unnecessary burden. It is, therefore, sufficient for Federal Error that right of insistence upon such requirements has been waived by a State Court in question, and that the Federal question has been treated by the State Courts as properly raised, and has been dealt with.[62]

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[58]Mutual L. Ins. Co. v. McGrew, (cited above) at p. 313; Chesapeake & O. Ry. v. McCabe, 213 U. S. 207; S 29:430; L 53:765: (the Federal contention in the latter case being that of right to plead in bar, in a State Court, a Federal judgment rendered pending the State suit).

[59]Capital Bank v. Cadiz Bank, 172 U. S. 425; S 19:202; L 43: 502; Michigan Sugar Co. v. Michigan, 185 U. S. 112; S 22:581; L 46:829; Seaboard Air Line v. Duvall, 225 U. S. 477; S 32:790; L 56:1171.

[60]Porter v. Foley, 24 How. 415; L 16:740; Osborne v. Clark, 204 U. S. 565; S 27:319; L 51:619; Consolidated Turnpike Co. v. Norfolk etc. Ry., 228 U. S. 326; S 33:510; L 57:857; 228 U. S. 596; S 33:605; L 57:982; Bowe v. Scott, 233 U. S. 658; S 34:769; L 58:1141.

(A contrary view was taken in Spencer v. Merchant, 125 U. S. 345; S 8:921; L 31:763).

[61]¶¶ 5, 7, 8, supra.

[62]Davis v. Packard, 6 Pet. 41; L 8:312; 7 Pet. 276; L 8:684; Mallett v. North Carolina, 181 U. S. 589; S 21:730; L 45:1015; Land & Water Co. v. San José Ranch Co., 189 U. S. 177; S 23:487; L 47:765; Leigh v. Green, 193 U. S. 79; S 24:390; L 48:623; Haire v. Rice, 204 U. S. 291; S 27:281; L 51:490; McKay v. Kalyton, 204 U. S. 458; S 27:346; L 51:566; St. Louis, Iron Mtn. etc. Ry. v. Hesterly, 228 U. S. 702; S 33:703; L 57:1031; International Harvester Co. v. Missouri, 234 U. S. 199; S 34:859; L 58:1276; Grannis v. Ordean, 234 U. S. 385; S 34:779; L 58:1363.

§ 808. **Non-Federal Questions, Incidentally Appearing.**

Non-Federal questions incidentally presented by the record, in conjunction with (but not related to and affecting) a Federal question presented, are not before the Federal Appellate Court for Review; but are left as left by the State Court.[63]

§ 809. **New Element Arising Pending Federal Writ of Error.**

If, pending Federal Error to a State Court, a new element is injected into the cause, (as, by enactment of State legislation), material to a pending Federal question, the question newly arising will, in general, not be passed upon, but will be left open for initial State Judicial dealing therewith, in the cause.[64]

§ 810. **"Drawn in Question."**

As in Appeal and Error generally, so in the field now in question, it is, for purposes of Error, immaterial how, as between the parties, a matter was "drawn in question"; that is to say, whether the Federal contention relied on (a) strictly originated with the plaintiff in Error, or (b) arose as an affirmative Federal counter-contention by him, in reply to a Federal contention of the opposing party; or (c) arose in the form of mere denial, by the plaintiff in Error, of soundness of a Federal contention of the opposing party.[65]

§ 811. **State Court Proceeding to Judgment, Pursuant to Remand.**

When the Federal Court, in Removal Procedure, wrongly makes Remand to the State Court, the proper remedy of the petitioner for Removal is Mandamus to the Federal Court, to compel annulment of the Remand and assumption of

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[63]Hannibal etc. R. R. v. Packet Co., 125 U. S. 260; S 8:874; L 31:731; a great number of later cases: the principle being one of constant application.

[64]Campbell v. California, 200 U. S. 87; S 26:182; L 50:382.

[65]§ 795, ¶ 4 and cases there cited (dealing primarily with the clause eliminated by the Amendment of Sept. 6, 1916, from the Error text; but here applicable a fortiori).

jurisdiction;[66] and it is not competent to him to neglect that remedy (and to allow the State Court to proceed to judgment), and then to challenge the validity of the Remand by a Writ of Error to the State Court.[67]

This principle may well rest upon general principles of propriety in Procedure, and of waiver and estoppel by neglect of the proper and convenient remedy, and does not necessarily involve the question[68] of State denial as a condition of Federal Error to a State Court.

§ 812. Potential Scope of the Supreme Court's Judgment.

Under the text now in question, the Supreme Court may enter a final judgment upon the Merits, thereby excluding all further State jurisdiction of the cause.[69]

§ 813. The Situation of No Federal Jurisdiction of the Writ of Error.

Where there proves to be no foundation for the Writ of Error, the Supreme Court has jurisdiction only for the purpose of dismissal, not for incidental purposes.[70]

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[66]Railroad v. Wiswall, 23 Wall. 507; L 23:103; In re Grossmayer, 177 U. S. 48; S 20:535; L 44:665; Ex parte Wisner, 203 U. S. 449; S 27:150; L 51:264.

As to absence of right to Federal writ of Error to a Federal judgment of Removal, see Jud. Code text cited in our § 824, ad init., note.

[67]Missouri Pac. Ry. v. Fitzgerald, 160 U. S. 556; S 16:389; L 40:536; Nelson v. Moloney, 174 U. S. 164; S 19:622; L 43:934.

[68]Considered in an earlier section of this Chapter.

[69]Code text cited at the beginning of this Chapter; Williams v. Bruffy, 102 U. S. 248; L 26:135.

[70]Not, e. g., for judgment for costs. Strader v. Graham, 18 How. 602; L 15:464.

PART III.

JUDICIAL REVIEW AS AMONG FEDERAL COURTS.

CHAPTER CLII

General Principles.[1]

§ 814. In All Classes of Suits.

Other Jurisdictional conditions being present, it is immaterial in what class of suit or proceeding Appeal or Error is sought.[2]

§ 815. Disregard, to a Certain Extent, of Form.

A certain degree of discretion is exercised in overlooking mistake in mere form, as between different forms of Appellate resort (from a Federal Court).[3]

§ 816. Review by the Extraordinary Common Law Writs.[4]

1] Pursuant to Common Law principles, Mandamus

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[1]For principles not peculiar to inter-Federal (but common to inter-Federal and Federal-State) Appellate Jurisdiction, see Part I, supra (§§ 785-794).

This Chapter deals with inter-Federal Appellate Review generally, and is not limited to Review by the Supreme Court.

[2]Whitten v. Tomlinson, 160 U. S. 231; S 16:297; L 40:406; Rice v. Ames, 180 U. S. 371; S 21:406; L 45:577; Dimmick v. Tompkins, 194 U. S. 540; S 24:780; L 48:1110; Dallemagne v. Moisan, 197 U. S. 169; S 25:422; L 49:709.

[3]Thus, an Appeal record has been treated as a return to Certiorari Farrell v. O'Brien, 199 U. S. 89; S 25:727; L 50:101. So, Certiorari has been granted, to cover a possible absence of jurisdiction by Appeal. Montana Mining Co. v. St. Louis Mining Co., 204 U. S. 204; S 27:254; L 51:444.

See, now, Act of Sept. 6, 1916, § 4, (39 Stats. 727):—

> That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed.

[4]As to statutory Certiorari, see § 849.

Jud. Code, § 234:—

> The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in

does not lie (from the Supreme Court to a lower Federal Court) as an optional substitute for Appeal or Error.[5]

2] So of Common Law Certiorari;[6]

3] Of Prohibition,[7] and

4] Of Habeas Corpus.[8]

5] The Appellate or Revisory function of those writs may be said to lie primarily in the field of questions of jurisdiction of the lower Federal Court in question, to the end, either (a) of enforcement of exercise of such jurisdiction, where it exists,[9]

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cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States. * * *

§ 262:—

The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

[5]In re Humes, 149 U. S. 192; S 13:836; L 37:698; In re Huguley Mfg. Co., 184 U. S. 297; S 22:455; L 46:549; In re Pollitz, 206 U. S. 323; S 27:729; L 51:1081; Ex parte Nebraska, 209 U. S. 436; S 28:581; L 52:876; Matter of Riggs, 214 U. S. 9; S 29:598; L 53:887; Ex parte Gruetter, 217 U. S. 586; S 30:690; L 54:892; Ex parte Leaf Tobacco Board, 222 U. S. 578; S 32:833; L 56:323; Ex parte Roe, 234 U. S. 70; S 34:722; L 58:1217.

[6]Ex parte Young, 209 U. S. 123; S 28:441; L 52:714; United States v. Dickinson, 213 U. S. 92; S 29:485; L 53:711.

[7]Ex parte Gordon, 104 U. S. 515; L 26:814; In re Huguley Mfg. Co., 184 U. S. 297; S 22:455; L 46:549; Alexander v. Crollott, 199 U. S. 580; S 26:161; L 50:317; Ex parte Oklahoma, 220 U. S. 191; S 31:426; L 55:431; Ex parte Oklahoma (No. 2), 220 U. S. 210; S 31:431; L 55:436.

[8]Ex parte Watkins, 3 Pet. 193; L 7:650; Ex parte Parks, 93 U. S. 18; L 23:787; In re Swan, 150 U. S. 637; S 14:225; L 37:1207; United States v. Pridgeon, 153 U. S. 48; S 14:746; L 38:631; In re Chapman, 156 U. S. 211; S 15:331; L 39:401; McKenzie, Pet'r, 180 U. S. 536; S 21:468; L 45:657; In re Lincoln, 202 U. S. 178; S 26:602; L 50:984; Doyle v. London Guarantee Co., 204 U. S. 599; S 27:313; L 51:641; Ex parte Simon, 208 U. S. 144; S 28:238; L 52:429; Toy Toy v. Hopkins, 212 U. S. 542; S 29:416; L 53:644; Glasgow v. Moyer, 225 U. S. 420; S 32:753; L 56:1147; Johnson v. Hoy, 227 U. S. 245; S 33:240; L 57:497; Henry v. Henkel, 235 U. S. 219; S 35:54; L 59:203.

[9]Railroad v. Wiswall, 23 U. S. 507; L 23:103; In re Grossmayer, 177 U. S. 48; S 20:535; L 44:665; Ex parte Wisner, 203 U. S. 449; S 27:150; L 51:264; (Mandamus to vacate Remand, and to enforce

6] or (b) of inhibition of assumption of such jurisdiction where jurisdiction is, in law, absent.[10]

7] For applicability of the principle last above considered, the lack of jurisdiction below (where such lack of jurisdiction is relied upon) must be absolute and complete. Thus, Mandamus will not lie to compel Remand, where the District Court has color of jurisdiction, and has, thereby, jurisdiction at least to pass favorably upon the question of its own jurisdiction (subject to ultimate Federal Error to its judgment upon the Merits).[11]

8] Pursuant, however, to Common Law principles, Mandamus and Certiorari lie by way of supplement to Appeal or Error, in situations within the reason, but not within the actual scope, (present or ultimate), of Appeal or Error.[12]

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assumption of jurisdiction by Removal); In re Connaway, 178 U. S. 421; S 20:951; L 44:1134: (Mandamus to compel assumption of Jurisdiction of a newly-introduced party); McClelland v. Carland, 217 U. S. 268; S 30:501; L 54:762: (Mandamus to review the action of a District Court in declining jurisdiction); In re Merchants' Stock Co., 223 U. S. 639; S 32:339; L 56:584; (Mandamus from the Supreme Court to a Circuit Court of Appeals, to compel it to entertain jurisdiction of a Writ of Error); Ex parte Uppercu, 239 U. S. 435; S 36:140; L 60:368: (Mandamus to release sealed documentary evidence for use in another cause).

[10]In re Winn, 213 U. S. 458; S 29:515; L 53:873; (Mandamus to compel Remand, in the absence of jurisdiction).

Ex parte Phœnix Ins. Co., 118 U. S. 610; S 7:25; L 30:274; In re Metropolitan Trust Co., 218 U. S. 312; S 31:18; L 54:1051; Ex parte United States, 226 U. S. 420; S 33:170; L 57:281; United States v. Mayer, 235 U. S. 55; S 35:16; L 59:129: (Prohibition in respect of a cause as a whole).

Ex parte Metropolitan Water Co., 220 U. S. 539; S 31:600; L 55:576: (Mandamus to inhibit action in a particular feature not within the jurisdiction of the Judge in question).

Ex parte Lange, 18 Wall. 163; L 21:872; Ex parte Fisk, 113 U. S. 713; S 5:724; L 28:1117; In re Ayers, 123 U. S. 443; S 8:164; L 31:216; Nielsen, Pet'r, 131 U. S. 176; S 9:672; L 33:118; Ex parte Young, 209 U. S. 123; S 28:441; L 52:714; Ex parte Webb, 225 U. S. 663; S 32:769; L 56:1248; (Habeas Corpus, based upon contention of absence of jurisdiction in the lower Federal Court).

[11]In re Gruetter, 217 U. S. 586; S 30:690; L 54:892.

[12]Railroad v. Wiswell; In re Grossmayer; Ex parte Wisner; In re Winn, all cited above.

9] It is not a bar to such extraordinary Common Law writs, to such end, that the question in issue might ultimately be brought up by Appeal or Error.[13]

§ 817. The Extraordinary Common Law Writs, Merely in Aid of Existing Appellate Jurisdiction.

In aid or in furtherance of its existing Appellate Jurisdiction, a Federal Appellate Court may avail itself of the extraordinary Common Law Writs.[14]

§ 818. Data of Ascertainment of Decision Below.

What has been said at an earlier point,[15] of the record, and of an Opinion, as data for ascertainment of the decision below, is applicable, mutatis mutandis, in the field now immediately in question.[16]

§ 819. Persistency of the Jurisdiction.

Where, pending Error (to a Federal Court), the question upon which the Supreme Court's jurisdiction (of the particular case) rested, has disappeared, the Court retains jurisdiction, in respect of other questions presented by the Writ of Error.[17]

§ 820. Finality of Mandate.

1. If the decree below is in conformity with the Mandate from the Supreme Court, no Appeal thereto lies.[18]

2. A trial Court, below, cannot, after Mandate from the Supreme Court, alter the issues, or the status of the cause, as dealt with by the Mandate, without order of the Supreme Court.[19]

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[13]In re Metropolitan Trust Co., cited above.

[14]Jud. Code, § 262:—

> * * * The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

[15]§ 805.

[16]Loeb v. Columbia Township, 179 U. S. 472; S 21:174; L 45:280; Memphis v. Cumberland Teleph. Co., 218 U. S. 624; S 31:115; L 54:1185.

[17]Michigan Centr. R. R. v. Vreeland, 227 U. S. 59 (see p. 63); S 33:192; L 57:417; Norfolk & Western Ry. v. Earnest, 229 U. S. 114; S 33:654; L 57:1096.

[18]Stewart v. Salamon, 97 U. S. 361; L 24:1044; Humphrey v. Baker, 103 U. S. 736; L 26:456. See § 834.

[19]In re Potts, 166 U. S. 263; S 17:520; L 41:994.

CHAPTER CLIII.

JURISDICTION OF A DISTRICT COURT AS SUCH.[1]

§ 821. Prefatory.

In respect of a lower Federal Court of Original Jurisdiction, a question of jurisdiction in, or in respect of, a particular cause, may turn either (a) upon general principles, or (b) upon principles peculiar to such Court, or to Courts of its class. In the text cited, the term "jurisdiction" intends jurisdiction in the narrower of the two senses.[2]

The jurisdiction intended is that of the District Court immediately in question, not that of some other (even another Federal) Court collaterally in question.[3]

§ 822. Illustration:—(a) of Jurisdiction in the Narrow Sense.

Illustration of Jurisdiction in the narrow sense, may be presented as follows:—

1] Jurisdiction as invoked solely by, and as resting solely upon, Federal Question;[4]

2] Jurisdiction as turning upon effectual service whether as prescribed (a) directly by Federal law, or (b) by State Procedure law Federally adopted;[5]

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[1]Jud. Code, § 128, as Amended by Act of Jan'y 28, 1915 (38 Stat. 802) § 2:—

> Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; * * * [for the remainder of the section, (not here material), see our § 824].

[2]See succeeding sections.

[3]In re Lennon, 166 U. S. 548; S 17:658; L 41:1110; Empire State-Idaho Min'g Co. v. Hanley, 205 U. S. 225; S 27:476; L 51:779; Childers v. McClaughry, 216 U. S. 139; S 30:370; L 54:420.

[4]American Sugar Ref'g Co. v. New Orleans, 181 U. S. 277; S 21:646; L 45:859; Excelsior Pipe Co. v. Pacific Bridge Co., 185 U. S. 282; S 22:681; L 46:910; Union Bank v. Memphis, 189 U. S. 71; S 23:604; L 47:712.

[5]Shepard v. Adams, 168 U. S. 618; S 18:214; L 42:602; Board of Trade v. Hammond Elev. Co., 198 U. S. 424; S 25:740; L 49:

3] Jurisdiction as turning upon the question whether service of process was to be under Adopted State Procedure, or under a Federal Rule of Court;[6]

4] Jurisdiction as defined and controlled by a question of exhaustion of jurisdiction (of the Federal trial Court) once existing;[7]

5] Jurisdiction as turning upon a question of creation of an artificial or fictitious Federal Jurisdictional situation;[8]

6] Jurisdiction as turning upon the question whether the suit in question is, or is not, in character, a suit against a State;[9]

7] Jurisdiction as turning upon the question of right to hold the defendant in a particular Federal District;[10]

8] Jurisdiction as turning upon the question of existence, within the District, of property relied on for local venue;[11]

9] Jurisdiction as turning upon a question of interpretation or operation of the Federal Removal legislation as such;[12]

10] Jurisdiction (in the case of Removal), as depending upon existence of jurisdiction in the State Court, where the jurisdiction of the State Court turns upon a Federal ques-

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1111; Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245; S 29:445; L 53:782; Herndon-Carter Co. v. Norris, 224 U. S. 496; S 32:550; L 56:857.

[6]Kendall v. American Automatic Loom Co., 198 U. S. 477; S 25:768; L 49:1133.

[7]In re Metropolitan Trust Co., 218 U. S. 312; S 31:18; L 54:1051.

[8]In re Lehigh Mining Co., 156 U. S. 322; S 15:375; L 39:438.

[9]Scully v. Bird, 209 U. S. 481; S 28:597; L 52:899: (such question involving interpretation and operation of the Eleventh Amendment in its dealing with Federal Courts).

[10]Louisville & Nashv. R. R. v. Western Un. Tel. Co., 234 U. S. 369; S 34:810; L 58:1356; Male v. Atchison, T. & S. F. Ry., 240 U. S. 97; S 36:351; L 60:544; Merriam v. Saalfield, 241 U. S. 22; S 36:477; L 60:868: (such question involving interpretation of the Congressional Venue legislation).

[11]Chase v. Wetzler, 225 U. S. 79; S 32:659; L 56:990.

[12]Powers v. Chesapeake & O. Ry., 169 U. S. 92; S 18:264; L 42:673; Arkansas v. Kansas & Tex. Coal Co., 183 U. S. 185; S 22:47; L 46:144; Remington v. Central Pac. R. R., 198 U. S. 95; S 25:577; L 49:959.

tion proper: as, upon the Federal right to service of process, as matter of Due Process of law;[13]

11] Jurisdiction as turning upon a question of existence, and of effectual averment, of diversity of citizenship.[14]

§ 823. Illustration:—(b) of Jurisdiction, Not Such in the Narrow Sense.

Illustration of jurisdiction not such in the narrow sense may be presented as follows:—

1] Jurisdiction Ancillary to jurisdiction itself not within the narrow sense;[15]

2] Jurisdiction of Intervention, in a cause not itself of jurisdiction in the narrow sense;[16]

3] Jurisdiction as turning upon principles of general law, applicable to Courts of justice, generally;[17]

4] Jurisdiction, in the case of Removal, as turning upon a non-Federal question;[18]

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[13]Goldey v. Morning News, 156 U. S. 518; S 15:559; L 39:517; Remington v. Central Pac. R. R., cited above.

[14]Hennessy v. Richardson Drug Co., 189 U. S. 25; S 23:532; L 47:697.

[15]Carey v. Houston & Tex. Centr. Ry., 150 U. S. 170; S 14:63; L 37:1041; Carey v. Houston & Tex. Centr. Ry., 161 U. S. 115, 126; S 16:537; L 40:638; Childers v. McClaughry, 216 U. S. 139; S 30:370; L 54:420.

[16]Bache v. Hunt, 193 U. S. 523; S 24:547; L 48:774; St. Louis, Ks. City etc. R. R. v. Wabash R. R., 217 U. S. 247; S 30:510; L 54:752.

[17]United States v. Larkin, 208 U. S. 333; S 28:417; L 52:517. A Federal Collector of customs succeeded, by acts in pais, in getting certain imported goods out of the Collection District of their importation, (where they were in the hands of representatives-in-title of the importer), into his own Collection District, (which was a different Federal Judicial District), and there made seizure, and libelled the goods for forfeiture in the District Court of that District. In this situation, the question of jurisdiction of this particular District Court was a question of venue, as between two certain Districts, and turned upon principles not peculiar to, or peculiarly characteristic of, the Federal District Courts; and was not a question of jurisdiction within the meaning of the text now under discussion.

So, of application, in and as of, a certain State of the Bankruptcy Jurisdictional expression "engaged chiefly in farming or the tillage of the soil",—such expression being non-technical language, although employed in Federal legislation. Denver Bank v. Klug, 186 U. S. 202; S 22:899; L 46:1127.

[18]Blythe v. Hinckley, 173 U. S. 501; S 19:497; L 43:783: (a question of finality, under State law, of a certain Probate distribution of assets).

5] Jurisdiction, in the case of Removal, as turning upon a question of jurisdiction of the State Court, where the latter question turned upon non-Federal principles;[19]

6] Jurisdiction as turning upon general Common Law principles[20] of Exclusiveness by Priority;[21]

7] Jurisdiction as turning upon general principles of Equity Precedure: e. g., as to indispensable parties;[22]

8] Jurisdiction as turning upon general principles, not peculiar to the Federal law: (e. g., as to enforcement by one Sovereign of Penal laws of another Sovereign), as applicable as between the United States and a State;[23]

9] Jurisdiction as turning upon a general Common Law principle concerning exhaustion of ordinary statutory remedy as a pre-requisite to a resort to Equity;[24]

10] Jurisdiction (in a loose sense of the term) as turning upon a question of Merits.[25]

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[19]Courtney v. Pradt, 196 U. S. 89; S 25:208; L 49:398; Kansas City Northw. R. R. v. Zimmerman, 210 U. S. 336; S 28:730; L 52:1084.

[20]§§ 621-626.

[21]Louisville Trust Co. v. Knott, 191 U. S. 225; S 24:119; L 48:159.

(In Shields v. Coleman, 157 U. S. 168; S 15:570; L 39:660; the question was not of mere Priority as such, but of loss by the Federal Court of jurisdiction once existing).

[22]Bogart v. Southern Pac. Co., 228 U. S. 137; S 33:497; L 57:768.

[23]Fore River Ship Bldg. Co. v. Hagg, 219 U. S. 175; S 31:185; L 55:163.

[24]Darnell v. Illinois Centr. R. R., 225 U. S. 243; S 32:760; L 56:1072: the statutory remedy here in question being: application to the Interstate Commerce Commission.

[25]Schunk v. Moline Co., 147 U. S. 500; S 13:416; L 37:255; Smith v. McKay, 161 U. S. 355; S 16:490; L 40:731; Huntington v. Laidley, 176 U. S. 668; S 20:526; L 44:630; Lucius v. Cawthorn-Coleman Co., 196 U. S. 149; S 25:214; L 49:425; Doyle v. London Guarantee Co., 204 U. S. 599; S 27:313; L 51:641; Farrugia v. Philadelphia & Reading Ry., 233 U. S. 352; S 34:591; L 58:996.

CHAPTER CLIV.

REVIEW BY APPEAL OR ERROR, OF JUDGMENTS OR DECREES OF DISTRICT COURTS: (a) BY THE SUPREME COURT; (b) BY A CIRCUIT COURT OF APPEALS.[1]

§ 824. Code Texts of General Character:—General View.

1. To a limited extent, the Judicial Code provides for direct resort to the Supreme Court.[2]

2. In general, it provides for resort to a Circuit Court of Appeals.[3]

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[1]As to "final" character, or not, of the judgment of a Circuit Court of Appeals, see the succeeding Chapter.

As to Certificate from, or Error to, a Circuit Court of Appeals, see Chapter CLVI.

[2]Jud. Code, § 238, as Amended by Act of Jan'y 28, 1915 (38 Stats. 803, 804) § 2:—

> Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

To the effect that final judgment is apparently here intended as a condition, in general, of Appeal or Error, see our § 790 and cases there cited.

As to the Criminal Appeals Act, see our § 841.

As to direct resort to the Supreme Court in Bankruptcy, see also Jud. Code, § 252, as possibly affected by later Congressional legislation above cited (see our §§ 842-845).

[3]Jud. Code, § 128, as Amended by Act of Jan'y 28, 1915 (38 Stats. 803, 804) § 2:—

> The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, in all cases

3. There is a specific limitation in respect of Remand, in Removal Procedure.[4]

4. The limitative clause "unless otherwise provided by law", of the Courts of Appeals text cited above (Code section 128), is not confined, in its limitative scope and operation, to other Code text,[5] but contemplates also actual or possible Congressional limitative text extraneous to the Judicial Code.[6]

In particular, this limitative clause (of the Courts of Appeals text) may operate (in narrowing the scope of this latter text) to enlarge the scope of the Supreme Court text (Code section 238) cited above.[7]

From this latter consideration, it follows: that the Supreme Court text (cited above) is not intended to be exhaustive: but that it contemplates (as supplemental to, and as expansive of, itself) not merely (a) other Code text,[8] but also (b) possible or actual Congressional text extraneous to the Code.[9]

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other than those in which appeals and writs of error may be taken direct to the Supreme Court as provided in section two hundred and thirty-eight [reproduced above] unless otherwise provided by law * * * [discretionary Certificate and Certiorari: as to which see our §§ 848, 849; and "final" character of judgment of a Circuit Court of Appeals: as to which see our §§ 842-847].

As to Appeal from Interlocutory decrees or orders in respect of Injunction, see our § 840.

[4]Jud. Code, § 28:—

* * * Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: * * *

As to Mandamus, in such case, see our § 816.

[5]As: to the Remand text cited above, and Code text cited in our § 841.

[6]Petri v. Creelman Lumber Co., 199 U. S. 487; S 26:133; L 50:281.

United States v. Dalcour, 203 U. S. 408; S 27:58; L 51:248: (exceptional right of direct resort from a District Court to the Supreme Court, under a special Land Title Act).

[7]Case cited. [8]As, that cited in our § 821.

[9]United States v. Dalcour, cited above.

§ 825. Plan, Method, and Scope of the Chapter, in Respect of the General Code Texts Cited.

The general Congressional scheme, in the field now in question, while fragmentarily, and while not simply and clearly, presented in the Code texts, above cited, and while not textually presented in the Code as a unity, is, nevertheless, a unity, and can be most conveniently and most clearly here presented and dealt with, as such, from the two-fold standpoint of (a) the Supreme Court and (b) the Circuit Courts of Appeals.[10]

§ 826. The General Scheme.

The general scheme of Appeal from, or Error to, a final judgment of an (intra-State) District Court of the United States, is as follows:—

(1) Apart from judgments of Remand (in Removal Procedure), the Congressional provision of Review of such judgments, by such process, is broad, and full and complete, and extends to the full breadth of Appeal and Error, as known to the Common Law.[11]

(2) Such Review is exhaustively distributed between the Supreme Court, on the one hand, and the Circuit Courts of Appeals on the other hand: the field of the Supreme Court, and that of the Circuit Courts of Appeals being, for any particular instance of actual Appeal or Error, mutually exclusive.

That is to say: (first) whenever (apart from Remand) Appeal or Error would lie under general Common Law principles, Appeal or Error lies (in respect of a final judgment of such District Court); and (second) it so lies, either (a) to (and exclusively to) the Supreme Court or (b) to (and exclusively to) a Circuit Court of Appeals.

In speaking of these two Appellate Jurisdictions, as mutually exclusive, we intend the situation actually framed and presented (in a particular instance) after final judg-

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[10]The question of finality or non-finality of the judgment of a Circuit Court of Appeals as against ultimate Review of such judgment (by Appeal or Error) by the Supreme Court, is a separate and distinct matter, and is treated in the succeeding Chapter.

As to discretionary ultimate Review, by statutory Certificate or statutory Certiorari, see Chapter CLVI (§§ 848, 849).

[11]In the broad sense of the latter term including Equity, etc.

ment in the District Court, by an Appellant or plaintiff in Error.[12]

§ 827. **Inadvertent Writ of Error.**

A premature (and thereby inoperative) Writ of Error, does not defeat a Writ of Error subsequently (and properly) sued out; but the former Writ will be dismissed, and the latter will stand.[13]

§ 828. **Allotment of the Appellate Jurisdiction, as between the Supreme Court and the Circuit Courts of Appeals—Illustration.**

For the purposes of division and allotment of the direct Appellate Jurisdiction, as between the Supreme Court and the Circuit Courts of Appeals, there are four generically distinct potential situations as follows:—

(1) If an issue of "jurisdiction" (of the District Court) is the sole issue raised by the Appeal or Error, that issue is to be certified;[14] and the Appeal or Error lies to the Supreme Court.[15] An issue of "jurisdiction" may stand "alone", either (a) by entire absence of any other issue; or (b) by sacrifice, and abandonment, by a proposing Appellant or plaintiff in Error, of other issues, for the purpose of effecting right of direct resort to the Supreme Court.

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[12]For particularization and illustration, and for authorities, see succeeding sections.

[13]Lamar v. United States, 241 U. S. 103; S 36:535; L 60:912: (Criminal Appeals Act; but generally applicable, in principle).

[14]Maynard v. Hecht, 151 U. S. 324; S 14:353; L 38:179; Moran v. Hagerman, 151 U. S. 329; S 14:354; L 38:181; Colvin v. Jacksonville, 157 U. S. 368; S 15:634; L 39:736; Davis & Rankin Co. v. Barber, 157 U. S. 673; S 15:719; L 39:853; The Bayonne, 159 U. S. 687; S 16:185; L 40:306; Van Wagenen v. Sewall, 160 U. S. 369; S 16:370; L 40:460; Chappell v. United States, 160 U. S. 499; S 16:397; L 40:510.

For definition, to this intent, of the term "jurisdiction" (of the District Court) see §§ 821-823.

[15]Cases last cited; Mechanical Appliance Co. v. Castleman, 215 U. S. 437; S 30:125; L 54:272; numerous other cases, cited §§ 821-823.

In the phrase "the question of jurisdiction alone shall be certified," the word "alone", it will be observed, qualifies not "shall be certified", but "the question of jurisdiction"; with the resultant meaning: "the question of jurisdiction, if standing alone"; i. e., "if it be the sole issue". See below, and cases there cited. The text cited has, therefore, no operation, one way or the other, upon the situation of an issue of "jurisdiction" joined with other issues. (Ubi supra).

(2) Where there is raised on Appeal or Error (alone, or coupled with issues of any character whatever), an issue within the second branch of the specified class,[16] Appeal or Error lies to the Supreme Court; and, in such situation, such principal issue carries with it, to the Supreme Court, all other issues, including (a) the issue of jurisdiction (if present),[17] and (b) issues not within any branch of the specified class: as, a mere general question of Merits;[18] and Appeal or Error lies to that Court exclusively.[19]

(3) Where there are coupled: (a) the issue of "jurisdiction," and (b) an issue not within the specified class, Appeal or Error lies to the Circuit Court of Appeals upon all issues, including that of jurisdiction.[20]

(4) Where no issue is raised within any branch of the specified class, Appeal or Error lies (and lies exclusively) to the Circuit Court of Appeals.[21]

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[16]I. e., * * * from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States * * *

[17]Burton v. United States, 196 U. S. 283; S 25:243; L 49:482.

[18]Nishimura Ekiu v. United States, 142 U. S. 651; S 12:336; L 35:1146; Horner v. United States (No. 2), 143 U. S. 570; S 12:522; L 36:266; Whitten v. Tomlinson, 160 U. S. 231; S 16:297; L 40:406; Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685; S 18:223; L 42:626; Loeb v. Columbia Township, 179 U. S. 472; S 21:174; L 45:280; Union Bank v. Memphis, 189 U. S. 71; S 23:604; L 47:712: (so much of the case as deals with the Appeal from the Circuit Court); Burton v. United States, cited above; Williamson v. United States, 207 U. S. 425; S 28:163; L 52:278.

[19]Robinson v. Caldwell, 165 U. S. 359; S 17:343; L 41:745; Union Bk. v. Memphis, cited above: (so much of the case as deals with the Appeal from the Circuit Court of Appeals); American Sugar Refining Co. v. New Orleans, 181 U. S. 277; S 21:646; L 45:859; Ayres v. Polsdorfer, 187 U. S. 585; S 23:196; L 47:314; Macfadden v. United States, 213 U. S. 288; S 29:490; L 53:801.

[20]United States v. Jahn, 155 U. S. 109; S 15:39; L 39:87; Robinson v. Caldwell, cited above. (In these cases, the issue of jurisdiction of the District Court was not specifically raised in that Court, but it appeared on the face of the record).

[21]Columbus Construction Co. v. Crane Co., 174 U. S. 600; S 19:721; L 43:1102: (this situation not being dealt with by Code § 238, and therefore falling within Code § 128).

It will be observed that the jurisdiction of the one or of the other Appellate Court is, in each situation, exclusive, by absence of provision, in any situation, for more than one Appellate remedy.[22]

§ 829. Use, in Our Text, of the Term "Specified".

For brevity, we shall, in succeeding sections of the present Chapter, employ the term "specified," to designate classes of cases or issues particularized in the texts above cited, as directly Reviewable by the Supreme Court.[23]

§ 830. The Term "Jurisdiction".

The term "jurisdiction", in the text cited above, as there used of the District Courts, is there employed in a narrowly restricted (and in what may be called a technical Federal) sense. That sense has been considered, with reference to the text now in question, at an earlier point, to which we here need merely to make reference.[24]

§ 831. * * * "Certified":—Form of Certification.[25]

The textual provision in respect of certification of the question of jurisdiction looks to substance, not to form; and there is a sufficient compliance with the requirement of certification, where the record proper presents the question of jurisdiction distinctly and concisely, and as the sole issue raised.[26]

Where the record proper is not of such character, a specific certificate is essential.[27]

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[22]Case last cited.

[23]I. e.: the cases or issues particularly mentioned in § 238, and cases or issues "otherwise provided by law". Other classes of cases or issues we shall designate as "not specified" or as "general".

[24]§§ 821-823.

[25]* * * the question of jurisdiction * * * shall be certified * * *

[26]In re Lehigh Min'g Co., 156 U. S. 322; S 15:375; L 39:438; Shields v. Coleman, 157 U. S. 168; S 15:570; L 39:660; Interior Construction Co. v. Gibney, 160 U. S. 217; S 16:272; L 40:401; Excelsior Pipe Co. v. Pacific Bridge Co., 185 U. S. 282; S 22:681; L 46:910; Herndon-Carter Co. v. Norris, 224 U. S. 496; S 32:550; L 56:857.

[27]Maynard v. Hecht, 151 U. S. 324; S 14:353; L 38:179; Moran v. Hagerman, 151 U. S. 329; S 14:354; L 38:181; Colvin v. Jacksonville, 157 U. S. 368; S 15:634; L 39:736; Davis & Rankin Co. v. Barber, 157 U. S. 673; S 15:719; L 39:853; The Bayonne, 159 U. S. 687; S 16:185; L 40:306; Van Wagenen v. Sewall, 160 U. S. 369; S 16:370; L 40:460; Chappell v. United States, 160 U. S. 499; S

The certificate (when required, and when made,) controls an Opinion delivered in the District Court.[28]

§ 832. "In Issue", and Other Like Terms.

1. Pursuant to an elementary principle of Appellate Procedure, "jurisdiction", (of the District Court), (a) cannot be "in issue," within the text cited, until after final judgment;[29] and (b) must be still in issue (as against the Appellant or Plaintiff in Error) at the time of Appeal or Error.[30]

2. The principle applies to other similar expressions in the text cited.[31]

§ 833. Cross-Appeal or Cross-Error.

Appellate Jurisdiction, as between the Supreme Court and the Circuit Court of Appeals, is fixed by the principal Appeal or Error, without regard to a Cross-Appeal or Cross-Writ of Error; and the latter goes, with the former, into the one or the other Court, as an Incident, without regard to the character of the issues presented by the Cross-Appeal, or Cross-Error.[32]

§ 834. Appeal or Error from Mandate.

Where[33] Appeal or Error lies in respect of (or of action below under) a Mandate, it lies exclusively to the Court (the Supreme Court or the Circuit Court of Appeals) from which the Mandate issued; and without regard to the character of the issues raised.[34]

16:397; L 40:510; Apapas v. United States, 233 U. S. 587; S 34:704; L 58:1104.

[28]Scully v. Bird, 209 U. S. 481; S 28:597; L 52:899.

[29]McLish v. Roff, 141 U. S. 661; S 12:118; L 35:893; Chicago, St. Paul etc. Ry. v. Roberts, 141 U. S. 690; S 12:123; L 35:905.

[30]Thus, where it has been passed upon favorably to an appellant, and judgment has gone against him upon the Merits, it is not "in issue". United States v. Jahn, 155 U. S. 109; S 15:39; L 39:87; Robinson v. Caldwell, 165 U. S. 359, 361, 362; S 17:343; L 41:745; Shepard v. Adams, 168 U. S. 618; S 18:214; L 42:602; Anglo-American Provision Co. v. Davis Provision Co. (No. 2), 191 U. S. 376; S 24:93; L 48:228.

[31]E. g., "is drawn in question".

[32]Field v. Barber Asphalt Co., 194 U. S. 618; S 24:784; L 48:1142.

[33]§ 820.

[34]Aspen Mining etc. Co. v. Billings, 150 U. S. 31; S 14:4; L 37:986; Webster v. Daly, 163 U. S. 155; S 16:961; L 41:111; Brown v. Alton Water Co., 222 U. S. 325; S 32:156; L 56:221; Metro-

§ 835. **Successive Appeals or Writs of Error.**

Where Appeal or Error results in a new trial and a new judgment, the question of Appeal or Error from the new judgment presents itself as a fresh question, unaffected by the mere fact of prior Appeal or Error; and is governed, as a fresh question, by the principles above considered.[35]

§ 836. **Not to the Supreme Court for Indirect Review of the Judgment of the Circuit Court of Appeals.**

One defeated in the Circuit Court of Appeals cannot indirectly effect Review of the decision of that Court by direct resort to the Supreme Court upon a new judgment of the District Court.[36]

§ 837. **Incidental Issues.**

Where direct resort lies to the Supreme Court upon a ground other than jurisdiction of the District Court (in the sense of that term in the text) the Supreme Court takes Appellate Jurisdiction of incidental questions.[37]

§ 838. **Recognition, and Protection, by the Supreme Court, of Issues Not of the Specified Class.**

To a certain extent, the Supreme Court, in its discretion, (in the course of exercise of its such Appellate Jurisdiction), takes notice of, and deals with, issues not within the specified class and (therefore) not strictly within the Appellate Jurisdiction of the Court, but appearing incidentally by the record. Thus, in the interest of such issues, the Court may order a new trial;[38] or the decree may be, in terms, without prejudice to such issues.[39]

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politan Co. v. Kaw Valley District, 223 U. S. 519; S 32:246; L 56: 533.

[35]Thus, where the plaintiff below successfully resorts, upon the Merits, to the Circuit Court of Appeals, Appeal or Error, by the defendant below (upon judgment adverse to him) upon the sole issue of jurisdiction, lies to the Supreme Court. Globe Newspaper Co. v. Walker, 210 U. S. 356; S 28:726; L 52:1096.

[36]As, by so amending his pleading in the District Court, as to present, upon the face of the amended pleading, an issue for direct Appeal or Error to the Supreme Court, upon a question adversely passed upon by the Circuit Court of Appeals. Union Trust Co. v. Westhus, 228 U. S. 519; S 33:593; L 57:947.

[37]Horner v. United States (No. 2), 143 U. S. 570; S 12:522; L 36:266.

[38]Murdock v. Ward, 178 U. S. 139; S 20:775; L 44:1009.

[39]High v. Coyne, 178 U. S. 111; S 20:747; L 44:997; Fidelity Ins. Co. v. McClain, 178 U. S. 113; S 20:774; L 44:998.

§ 839. Weight of Evidence.

In a case of Common Law character, weight of evidence is not within the Appellate Jurisdiction.[40]

§ 840. Appeal to a Circuit Court of Appeals from Interlocutory Decree of a District Court, Dealing with Injunction.[41]

Upon Appeal from an Interlocutory Decree, the Merits,—in so far as presented by the record—may be dealt with. Thus, upon an appeal from an Interlocutory decree in a Patent cause, adjudging validity of the patent in question, and ordering an injunction and account, the Merits of the Patent question are open in the Circuit Court of Appeals.[42]

§ 841. The Criminal Appeals Act.[43]

1. The Act was not repealed by the Judicial Code.[44]

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[40]Crumpton v. United States, 138 U. S. 361; S 11:355; L 34:958; Moore v. United States, 150 U. S. 57; S 14:26; L 37:996; Humes v. United States, 170 U. S. 210; S 18:602; L 42:1011.

[41]Jud. Code, § 129:—

> Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: Provided, however, That the court below may, in its discretion, require as a condition of the appeal an additional bond.

[42]Smith v. Vulcan Iron Works, 165 U. S. 518; S 17:407; L 41:810.

[43]Act of March 2, 1907 (34 Stat. 1246):—

> That a writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or

So, of later Judiciary legislation.[45]

2. In accordance with the terms of the Act, questions of general law are not open: as, questions of Criminal Pleading, in interpretation of the indictment.[46]

3. If the judgment below was rested by the District Court upon grounds, some within, and some not within the Act, the grounds of the former class, (and those grounds only), will be passed upon by the Supreme Court.[47]

4. It is not essential to Error that the Court below misconstrued a particular Constitutional or Congressional

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construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own cognizance: Provided, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

In general, and except as provided by this Act, Error does not lie, in favor of the United States, in a Criminal cause.

As to Constitutionality of the Act, see United States v. Bitty, 208 U. S. 393; S 28:396; L 52:543; United States v. Heinze, 218 U. S. 532; S 31:98; L 54:1139; both cited also under Equal Protection.

[44]United States v. Winslow, 227 U. S. 202; S 33:253; L 57:481; later cases cited in this section.

[45]Act of Jan'y 28, 1915 (38 Stats. 803) § 6:—

That this Act shall not affect cases now pending in the Supreme Court of the United States or cases in which writs of error or appeals have been allowed at the date of its approval. And nothing in this Act shall be deemed to repeal, amend, or modify the provisions of an Act entitled "An Act providing for writs of error in certain instances in criminal cases," approved March second, nineteen hundred and seven.

[46]United States v. Patten, 226 U. S. 525; S 33:141; L 57:333; United States v. Winslow, cited above; United States v. Davis, 231 U. S. 183; S 34:112; L 58:177; United States v. Carter, 231 U. S. 492; S 34:173; L 58:330. See United States v. New South Farm etc. Co., 241 U. S. 64, 73; S 36:505; L 60:890.

[47]United States v. Stevenson, 215 U. S. 190; S 30:35; L 54:153.

text; it is sufficient for Error that it failed to give operation to a text supportive of the indictment.[48]

5. Pursuant to general principles of Error, it is the duty of the Government, at the trial, to present its contentions with a reasonable degree of particularity, and to cause the denial of them to appear upon the Appellate record.[49]

6. Subject to the considerations presented immediately above, it is the duty of the District Court to disclose (for the purposes of the Appellate record) the grounds of its decision;[50] and a general order of dismissal, without such particularization, is ineffectual, and is to be reversed.[51]

7. Only such questions as were[52] passed upon by the Court below, are dealt with upon Error. All other questions are (in case of Reversal) left open.[53]

8. A motion to quash, (addressed to an indictment), based upon grounds which might have been presented by demurrer, is, in legal effect, a demurrer, within the contemplation of the Act.[54]

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[48]United States v. Nixon, 235 U. S. 231; S 35:49; L 59:207. See par. 5 below.

[49]United States v. Carter, cited above; United States v. Moist, 231 U. S. 701; S 34:255; L 58:444. (Compare with United States v. Nixon, cited above, in which the Government's contention below, although general in terms, was held sufficient).

[50]United States v. Nixon, cited above.

[51]Case last cited; see at p. 236: "If that were not so" * * *.

[52]Specifically or in legal effect: pars. 5, 6, supra.

[53]United States v. Keitel, 211 U. S. 370; S 29:123; L 53:230; United States v. Mason, 213 U. S. 115; S 29:480; L 53:725; United States v. Portale, 235 U. S. 27; S 35:1; L 59:111.

[54]United States v. Adams Ex. Co., 229 U. S. 381; S 33:878; L 57:1237.

CHAPTER CLV.

The Circuit Courts of Appeals as (to Certain Intents) Intermediate Appellate Courts.[1]

§ 842. General View.

We have considered, in the preceding Chapter, the Circuit Courts of Appeals without regard to the question of finality, in particular situations, of their judgments. We are, in the present Chapter, to consider the latter matter.

The practice is a familiar one, in various forms, of introducing, between trial Courts, of a particular forum, on the one hand, and the highest Appellate Court of the forum, on the other hand, an Intermediary Appellate Court (or class of Courts), subject, in respect of its or their judgments, to a greater or less scope of Review by such highest Appellate Court. To a certain extent, the Federal Circuit Courts of Appeals (in their Appellate Jurisdiction over the intra-State Federal District Courts and the United States Districts Courts of Hawaii and Porto Rico),[2] are of such Intermediate Appellate character.

Appellate Review by Appeal or Error, by the Supreme Court, of final judgments of the Circuit Courts of Appeals, extends, in a particular instance (as the situation may be) either (a) to the issues generally, dealt with by the judgment, or (b) only to particular classes of such issues.[3]

§ 843. The Code Texts as Amended.

We endeavor to present, in a note, the Code texts, as they now stand, Amended.[4]

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[1]Textually dealt with, in the Judicial Code, from the standpoint of their judgments, as, or as not, "final".

As to Review by Certificate or Certiorari, see the following Chapter.

[2]Hawaii and Porto Rico being, respectively, to this intent (as to certain other intents, see our § 824), joined to Federal intra-State Circuits: see Jud. Code, as now Amended. As to other Federal States, see Chapter CLVII (§ 850).

[3]See succeeding sections.

[4]Jud. Code, § 241:—

> In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme

§ 844. Certain Expressions of the Code Texts:—"Matter", "Suit", "Controversy", "Cases", "Proceedings".[5]

In the texts cited in the preceding section, the terms "matter", "suit", "controversy", "cases", and "proceedings", respectively, are employed distributively, in one or in the other of two senses: (a) of "cause" (in the popular sense of that term) and (b) of "issue".

Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs.

Jud. Code, § 128, as Amended by Act of Jan'y 28, 1915 (38 Stats. 803) § 2:—

> * * * except [certificate and certiorari] the judgments and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

Act of Jan'y 28, 1915 (38 Stats. 803), § 4, as Amended by Act of Sept. 6, 1916 (39 Stats. 727), § 3:—

> That judgments and decrees of the circuit courts of appeals in all proceedings and causes arising under "An Act to establish a uniform system of bankruptcy throughout the United States," approved July first, eighteen hundred and ninety-eight, and in all controversies arising in such proceedings and causes; also, in all causes arising under "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight; also, in all causes arising under "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March fourth, nineteen hundred and seven; also, in all causes arising under "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three; and also, in all causes arising under any amendment or supplement to any one of the aforementioned Acts which has been heretofore or may hereafter be enacted, shall be final, save only [certiorari].

[5] As to such terms, generally, (as potential variants and equivalents), and as to distributive employment of them in the Constitution and in Congressional Judiciary legislation, generally, see §§ 580-584.

This may be particularized as follows:—

(1) The term "matter" would appear to be employed in the sense of "issue".[6]

(2) In the expression: "in cases arising under the patent laws, under the copyright laws, under the revenue laws and under the criminal laws", the term "cases" appears to be employed in the sense of "issues"; and to deal with issues without regard to the character of a particular cause in question.

Thus, although a particular cause, viewed as a whole, may be a case "under the revenue laws", yet an issue arising therein, not of itself of revenue character, is not within the "revenue-laws" exclusion, but may be the subject of Appeal or Error.[7]

(3) In the Bankruptcy-exception text, the use of the terms appears to be as follows:—

(a) In the expression: "all proceedings and causes arising" [under the bankruptcy Act], the term "proceedings" perhaps intends, or includes, issues, inherently of Bankruptcy character, arising collaterally in a cause (itself not of Bankruptcy character) in a District Court and the term "causes" in the Bankruptcy-exception clause, is used of Bankruptcy cases (in the popular sense of the term "case") regardless of the inherent character of a particular issue; and includes issues not themselves of Bankruptcy character.[8]

(b) The expression: "and in all controversies arising in such proceedings and causes", would, by itself, and upon its face, seem to intend petitions filed in a Bankruptcy suit; Intervention, generally, in such a suit; and proceedings in a District Court Ancillary to such a suit.

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[6]As in texts dealing with Federal Jurisdictional Amount in Controversy. See §§685-687.

[7]That is, it does not fall within the category of "cases arising * * * under the revenue laws". Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397; S 24:376; L 48:496.

[8]Central Trust Co. v. Lueders, 239 U. S. 11; S 36:1; L 60:119. See also Moody v. Century Bank, 239 U. S. 374; S 36:111; L 60:336; (a cause arising prior to, and thereby not within, the Act of 1915, but definitory of proceeding in Bankruptcy).

(4) The expression: "in admiralty cases" includes suits for Limitation of Liability.[9]

In that expression, the term "cases" (a) would appear to intend Admiralty cases in the popular sense of the term "case", without regard to the inherent character of a particular issue; and thus to include issues not inherently of Admiralty character;[10] and (b) seems capable of the broader sense of "issues," and thus to extend to issues themselves of Admiralty character, arising (collaterally) in a cause not itself (as a whole) of such character.[11]

(5) The expression: "cases arising * * * under the criminal laws", is not limited to Criminal prosecutions proper, but extends to suit upon a Criminal recognizance.[12]

(6) The texts in question employ technical terms (of the Common Law, or of Federal law proper), in the technical sense.[13]

§ 845. **Diversity of Citizenship:—(a) Generally.**[14]

1. The text here cited refers, in legal effect, (for particu-

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[9]Oregon R. R. & Nav. Co. v. Balfour, 179 U. S. 55; S 21:28; L 45:82.

[10]I. e., applying to Admiralty causes the doctrine applied to Bankruptcy causes by Central Trust Co. v. Lueders, cited above.

[11]I. e., by application to the field of Admiralty and Maritime law the doctrine applied to the field of Revenue law by Spreckels Sugar Refining Co. v. McClain, cited above.

[12]Hunt v. United States, 166 U. S. 424; S 17:609; L 41:1063.

[13]"patent laws":—

Cary Mfg. Co. v. Acme Flexible Clasp Co., 187 U. S. 427; S 23:211; L 47:244.

"copyright laws":—

Press Publishing Co. v. Monroe, 164 U. S. 105; S 17:40; L 41:367; (not inclusive of "Common Law copyright").

(The limitation in respect of Copyright suit was first introduced by the Judicial Code. We may point out that Bobbs-Merrill Co. v. Straus, 210 U. S. 339; S 28:722; L 52:1086; Scribner v. Straus, 210 U. S. 352; S 28:735; L 52:1094; and Caliga v. Inter Ocean, 215 U. S. 182; S 30:38; L 54:150, were prior to the Judicial Code).

"revenue laws":—

Spreckles Sugar Refining Co. v. McClain, cited above. See, as illustrative, Pettigrew v. United States, 97 U. S. 385; L 24:1029.

So, of Diversity of Citizenship and of Federal Question, q. v.

[14]Jud. Code, § 128:—

* * * cases in which the jurisdiction [of the District Court] is dependent entirely upon diversity of citizenship * * *.

"Generally":—as to specific features, see succeeding sections.

lars of diversity of citizenship), to the text dealing with the Original Jurisdiction of the District Courts (initial or by Removal).[15]

2. In the clause here cited, the word "entirely" has its full natural force.[16]

3. The term "cases" includes (under general principles),[17] separable controversies Removed from a State Court.

As for the purposes of the Federal Original Common Law and Equity Jurisdiction,[18] so for the purposes now in question, the character of a suit is determined by the case as made by the plaintiff, in the District Court, by his initial pleading of his case in the District Court, whether in a case there initiated, or upon Removal;[19] and it is immaterial

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[15]As to which, see our §§ 722-730.

[16]Thus, where in a suit pending in a State Court, there is both diversity of citizenship, and a Federal question, and the suit is Removable on either ground, the Jurisdiction of the District Court, upon Removal, is not, within the text in question, dependent "entirely" upon diversity of citizenship. Northern Pac. R. R. v. Amato, 144 U. S. 465; S 12:740; L 36:506; Sonnentheil v. Moerlein Brewing Co., 172 U. S. 401; S 19:233; L 43:492; Northern Pac. Ry. v. Soderburg, 188 U. S. 526; S 23:365; L 47:575; Henningsen v. United States Fidelity Co., 208 U. S. 404; S 28:389; L 52:547; Louisville & Nashv. R. R. v. Cook Brewing Co., 223 U. S. 70; S 32:189; L 56:355; Wingert v. First Bank, 223 U. S. 670; S 32:391; L 56:605; United States Fidelity Co. v. Bray, 225 U. S. 205; S 32:620; L 56:1055; Missouri, Ks. & Tex. Ry. v. Wulf, 226 U. S. 570; S 33:135; L 57:355; Wilson Cypress Co. v. Del Pozo, 236 U. S. 635; S 35:446; L 59:758. Other cases are: Benjamin v. New Orleans, 169 U. S. 161; S 18:298; L 42:700; American Sugar Ref'g Co. v. New Orleans, 181 U. S. 277; S 21:646; L 45:859; Huguley Mfg. Co. v. Galeton Mills, 184 U. S. 290; S 22:452; L 46:546; Arbuckle v. Blackburn, 191 U. S. 405; S 24:148; L 48:239; Mississippi R. R. Comm. v. Illinois Centr. R. R., 203 U. S. 335; S 27:90; L 51:209; Bagley v. General Fire Extinguisher Co., 212 U. S. 477; S 29:341; L 53:605; Lovell v. Newman, 227 U. S. 412; S 33:325; L 57:577; Boise Water Co. v. Boise City (No. 2), 230 U. S. 98; S 33:1003; L 57:1409.

[17]§§ 721; 722-730.

[18]§§ 753 et seq.

[19]Colorado Centr. Mining Co. v. Turck, 150 U. S. 138; S 14:35; L 37:1030; Omaha Electric Co. v. Omaha, 230 U. S. 123; S 33:974; L 57:1419.

that he might properly have pleaded there a case different from the case actually pleaded.[20]

In accordance with (Federally adopted) Common Law conceptions and principles of Amendment, it is, however, the Amended, (not the original) initial pleading that is (in case of Amendment) material.[21]

So, pursuant to general principles of pleading, it is the legal effect of the plaintiff's pleading in the District Court that is material. Thus, where a bill alleges diversity of citizenship, and undertakes to allege, also, a Federal question; but the Federal question, as so presented, is without color of merit, the pleading, in that respect, is inoperative, and the pleading is viewed, for the purposes now in question, as alleging diversity of citizenship only.[22]

§ 846. Diversity of Citizenship:—(b) National Banks; Federally Chartered Railroads; Employers' Liability Suits.

1. NATIONAL BANKS.—The Courts of Appeals texts—now in question[23]—do not deal in terms with national banks as appellants or plaintiffs in Error; and upon those texts only, taken by themselves, the diversity-of-citizenship exclusion (from Appeal or Error from or to a Circuit Court of Appeals) would have no application to such banks, inasmuch as their Federal status (incorporation) would make suits by or against them, matter of Federal question,[24] and the jurisdiction of the District Court would thus in no case be dependent "entirely" upon diversity of citizenship, even where such diversity might exist. Clause Sixteenth, however, of the Code section dealing with Original Jurisdiction of the District Courts,[25] has an incidental or secondary operation through and under the texts now in question;

[20]Omaha Electric Co. v. Omaha, cited above.

[21]Vicksburg v. Henson, 231 U. S. 259; S 34:95; L 58:209.

[22]Denver v. New York Trust Co., 229 U. S. 123; S 33:657; L 57:1101; Norton v. Whiteside, 239 U. S. 144; S 36:97; L 60:186.

[23]Cited § 843. [24]§ 682, par. (3).

[25]Jud. Code, § 24, "Sixteenth": * * * and all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located. [The "other" actions being winding-up suits and suits against the Comptroller or a Receiver acting under his direction].

with the result: that the Federal corporate status of a national bank does not present, for the purposes of these texts, a Federal question; but a national bank, as such, is within the diversity of citizenship clause.[26]

2. Railroad Corporations of Congressional Incorporation.—Railroad corporations incorporated by Congress, are now similarly dealt with.[27]

3. Other Classes of Suits.—The same principles would seem to be applicable to certain classes of suits, based upon certain specified Acts of Congress,[28] exceptionally deprived, for Removal,[29] both of diversity of citizenship character and of Federal question character.

§ 847. Ancillary Suits.—Intervention Proceedings.

1. Ancillary Suits.—Pursuant to general conceptions and principles governing Ancillary suits, as such,[30] an Ancillary suit is, for the purposes of Appeal or Error from or to a Circuit Court of Appeals, viewed as a continuation of, and as part of, the principal suit; and is dealt with accordingly.[31]

2. Intervention Proceedings.—Pursuant to the general conception and principles governing Intervention and Intervenors,[32] an Intervention proceeding is, for the purposes now in question, viewed as, and dealt with as, a part of the principal suit.[33]

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[26]Ex parte Jones, 164 U. S. 691; S 17:222; L 41:601; Continental Bank v. Buford, 191 U. S. 119; S 24:54; L 48:119.

[27]Act of Jan'y 28, 1915 (38 Stats. 804), § 5:—

> No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress.

See our § 785, par. 4.

[28]Railroad Carriers' Employers' Liability, etc.

[29]§§ 683; 722.

[30]See §§ 584, 722.

[31]Carey v. Houston & Tex. Ry., 161 U. S. 115; S 14:63; L 37:1041; Pope v. Louisville, New Albany etc. Ry., 173 U. S. 573; S 19:500; L 43:814; Ohio R. R. Comm. v. Worthington, 225 U. S. 101; S 32:653; L 56:1004.

[32]See § 606.

[33]Gregory v. Van Ee, 160 U. S. 643; S 16:431; L 40:566.

As to possible exceptional issues raised upon an Intervention petition, see § 844.

CHAPTER CLVI.

CERTIFICATE FROM, AND STATUTORY CERTIORARI (FOR REVIEW) TO, THE CIRCUIT COURTS OF APPEALS.

§ 848. Certificate.[1]

From an early period, there has existed, in one or in another Federal Judicial field, Congressional provision for certification to the Supreme Court, of questions of law. The text now in question adopts the general principles that have been established in respect of such certification in general.

Certain applications in the present field, of such principles, may be referred to as follows:

Certification is to be only of questions of law;[2] and where more questions than one are to be presented, they must be presented each distinctly, by itself.[3]

Where the question of the jurisdiction of the District

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[1]Jud. Code, § 239:—

> In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

We may barely suggest the question whether the saving clause (cited in our next succeeding section) of sect. 3 of Act of Sept. 6, 1916, intended, (by its failure to speak of Certificate) to make Certiorari exclusive in the class of cases dealt with by the section in which the saving clause is embodied; and thereby to qualify, pro tanto, Jud. Code, § 239, supra.

[2]Cross v. Evans, 167 U. S. 60; S 17:733; L 42:77; Warner v. New Orleans, 167 U. S. 467; S 17:892; L 42:239; Chicago B. & Q. Ry. v. Williams, 205 U. S. 444, 454; S 27:559; L 51:875; Hallowwell v. United States, 209 U. S. 101; S 28:498; L 52:702; Baltimore & O. R. R. v. Interstate Com. Comm., 215 U. S. 216; S 30:86; L 54:164.

[3]Quinlan v. Green County, 205 U. S. 410; S 27:505; L 51:860.

Court can be, and is, taken to the Circuit Court of Appeals, that question is not, as such, excepted from the power of certification from the latter Court.[4]

In the text cited, the term "time" means, of course, "stage". The word is used broadly, and permits certification pending the cause in the Circuit Court of Appeals, and before final judgment.[5]

§ 849. Statutory Certiorari (for Review) to the Circuit Courts of Appeals.[6]

The words "or otherwise", in the text first cited, seem to add nothing, in legal effect; for if some other form of Revisory Procedure might be resorted to, under the "or otherwise" provision, it would be ejusdem generis with Certiorari, and subject to the same limitations.[7]

Certiorari, when granted, is provisional; and if, upon argument, the occasion for issue of the writ proves not to have existed, the writ will be dismissed.[8]

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[4]United States v. Jahn, 155 U. S. 109; S 15:39; L 39:87; American Sugar Ref'g Co. v. New Orleans, 181 U. S. 277; S 21:646; L 45:859.

[5]The Three Friends, 166 U. S. 1; S 17:495; L 41:897; Forsyth v. Hammond, 166 U. S. 506; S 17:665; L 41:1095.

[6]Jud. Code:—

> § 240. In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Act of Jan'y 28, 1915 (38 Stats. 803), § 4, as Amended by Act of Sept. 6, 1916 (39 Stats. 727), § 3, dealing, in the portion here omitted, with "final" character (as against Appeal or Error to the Supreme Court) of judgments and decrees of a Circuit Court of Appeals:—

> * * * save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority and with like effect as if taken to that court by appeal or writ of error.

(This saving clause appears to be inserted merely ex industria, and to add nothing, in respect of Certiorari, to Jud. Code, § 240, reproduced above).

[7]Huguley Mfg. Co. v. Galeton Mills, 184 U. S. 290, 295, ad fin.; S 22:452; L 46:546.

[8]United States v. Rimer, 220 U. S. 547; S 31:596; L 55:578.

CHAPTER CLVII.

APPELLATE REVIEW (BY THE SUPREME COURT; BY A CIRCUIT COURT OF APPEALS, OR BY AN INTRA-STATE DISTRICT COURT) OF JUDGMENTS OF COURTS OR OF MAGISTRATES IN FEDERAL AREAS.

§ 850. The Subject Generally.

To a certain extent, Congress has made provision for Appellate Review,—by the Supreme Court; by a Circuit Court of Appeals; or (in a minor field) by an intra-State District Court of the United States,—of judgments of Federal Courts or magistrates of or in Federal areas.

There is no one system pervading this field, but it differs widely as among different Federal areas.[1]

We may, however, refer to certain general principles and to certain features.

The Federal Organic law does not provide for right of Appeal or Error from a Federal Court of or in a Federal area.[2]

Congress has not undertaken to delegate to Federal States power of providing for Appeal or Error except as among Courts of a particular Federal State.[3]

In respect of Federal areas other than the District of Columbia, the Supreme Court has been given Appellate Jurisdiction only in matter of law.[4]

To a certain extent, a District Court of a Federal State is assimilated to the intra-State District Courts.[5]

In certain exceptional situations, Appellate Jurisdiction is vested in a District Court.[6]

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[1]As to particulars, see Judicial Code, under particular heads.

[2]Garzot v. de Rubio, 209 U. S. 283; S 28:543; L 52:794; Laurel Oil Co. v. Morrison, 212 U. S. 291; S 29:394; L 53:517.

[3]Cotton v. Hawaii, 211 U. S. 162; S 29:85; L 53:131.

[4]See Herrick v. Boquillas Co., 200 U. S. 96; S 26:192; L 50:388; Halsell v. Renfrow, 202 U. S. 287; S 26:610; L 50:1032. See also Eagle Mining Co. v. Hamilton, 218 U. S. 513; S 31:27; L 54:1131; Citizens Bank v. Davisson, 229 U. S. 212; S 33:625; L 57:1153; Monagas v. Albertucci, 235 U. S. 81; S 35:95; L 59:139.

[5]Jud. Code, § 116, cl. Ninth: (Hawaii); Jud. Code, § 116, cl. First, as Amended by Act of Jan'y 28, 1915 (38 Stat. 803), ad init. (Porto Rico). See our §§ 821, 824, 842.

[6]See Jud. Code, § 26.

APPENDIX.

APPENDIX.

THE FUNDAMENTAL ORDERS OF CONNECTICUT: 1638 (9).

[MODERNIZED].

Forasmuch as it hath pleased the Almighty God by the wise disposition of his divine providence so to order and dispose of things that we, the inhabitants and residents of Windsor, Hartford and Wethersfield are now cohabiting and dwelling in and upon the River of Connecticut and the lands thereunto adjoining; and well knowing where a people are gathered together, the word of God requires that to maintain the peace and union of such a people, there should be an orderly and decent Government established according to God, to order and dispose of the affairs of the people at all seasons as occasion shall require; do therefore associate and conjoin ourselves to be as one public State or Commonwealth; and do, for ourselves and our successors, and such as shall be adjoined to us at any time hereafter, enter into combination and confederation together, to maintain and preserve the liberty and purity of the gospel of our Lord Jesus which we now profess, as also the discipline of the churches, which, according to the truth of the said gospel is now practised amongst us; as also in our civil affairs to be guided and governed according to such laws, rules, orders and decrees as shall be made, ordered, and decreed as follows:—

1. It is ordered, sentenced and decreed, that there shall be yearly two general Assemblies or Courts, the one the second Thursday in April, the other the second Thursday in September, following. The first shall be called the Court of Election, wherein shall be yearly chosen, from time to time, so many magistrates and other public officers as shall be found requisite, whereof one to be chosen Governor for the year ensuing and until another be chosen, and no other magistrate to be chosen for more than one year; provided always there be six chosen besides the Governor; which being chosen and sworn according to an oath recorded for that purpose, shall have power to administer justice according to the laws here established, and for want thereof according to the rule of the word of God; which choice shall be made by all that are admitted freemen and have taken the oath of fidelity and do cohabit within this jurisdiction, (having been admitted inhabitants by the major part of the town wherein they live) or the major part of such as shall be then present.

2. It is ordered, sentenced and decreed, that the election of the aforesaid magistrates shall be on this manner: every person present and qualified for choice shall bring in (to the persons deputed to receive them) one single paper with the name of him written in it

whom he desires to have Governor, and he that hath the greatest number of papers shall be Governor for that year. And the rest of the magistrates or public officers to be chosen in this manner: the Secretary for the time being shall first read the names of all that are to be put to choice, and then shall severally nominate them distinctly, and every one that would have the person nominated to be chosen shall bring in one single paper written upon, and he that would not have him chosen shall bring in a blank; and every one that hath more written papers than blanks shall be a magistrate for that year; which papers shall be received and told by one or more that shall be then chosen by the Court and sworn to be faithful therein; but in case there should not be six chosen as aforesaid, besides the Governor, out of those which are nominated, then he or they which have the most written papers shall be a magistrate or magistrates for the ensuing year, to make up the aforesaid number.

3. It is ordered, sentenced and decreed, that the Secretary shall not nominate any person, nor shall any person be chosen newly into the magistracy, which was not propounded in some General Court before, to be nominated the next election; and to that end it shall be lawful for each of the towns aforesaid, by their deputies, to nominate any two whom they conceive fit to be put to election; and the Court may add so many more as they judge requisite.

4. It is ordered, sentenced and decreed, that no person be chosen Governor above once in two years, and that the Governor be always a member of some approved congregation, and formerly of the magistracy within this jurisdiction; and all the magistrates, freemen of this Commonwealth; and that no magistrate or other public officer shall execute any part of his or their office before they are severally sworn, which shall be done in the face of the Court if they be present, and in case of absence, by some deputed for that purpose.

5. It is ordered, sentenced and decreed, that to the aforesaid Court of Election the several towns shall send their deputies, and when the elections are ended they may proceed in any public service, as at other Courts. Also the other General Court, in September, shall be for making of laws, and any other public occasion which concerns the good of the Commonwealth.

6. It is ordered, sentenced and decreed, that the Governor shall, either by himself or by the Secretary, send out summons to the constables of every town, for the calling of these two standing Courts, one month at least before their several times; and also, if the Governor and the greatest part of the magistrates see cause, upon any special occasion, to call a general Court, they may give order to the Secretary so to do within fourteen days' warning; and if urgent necessity so require, upon a shorter notice, giving sufficient grounds for it to the deputies when they meet, or else be questioned for the same; and if the Governor and major part of magistrates shall either neglect or refuse to call the two General Standing Courts, or either of them, as also at other times when the occasion of the Commonwealth require, the freemen thereof, or the major part of them, shall petition to them so to do; if then it be either denied or neglected, the

said freemen or the major part of them shall have power to give order to the constables of the several towns to do the same, and so may meet together, and choose to themselves a Moderator, and may proceed to do any Act of power which any other General Court may.

7. It is ordered, sentenced and decreed, that after there are warrants given out for any of the said General Courts, the constable or constables of each town shall forthwith give notice distinctly to the inhabitants of the same, in some public assemhly, or by going or sending from house to house, that at a place and time by him or them limited and set, they meet and assemble themselves together to elect and choose certain deputies to be at the General Court then following, to agitate the affairs of the Commonwealth; which said deputies shall be chosen by all that are admitted inhabitants in the several towns and have taken the oath of fidelity; provided, that none be chosen a deputy for any General Court, which is not a freeman of this Commonwealth. The foresaid deputies shall be chosen in manner following: every person that is present and qualified as before expressed, shall bring the names of such, written in several papers, as they desire to have chosen for that employment, and these three or four, more or less, being the number agreed on to be chosen for that time, that have greatest number of papers written for them, shall be deputies for that Court; whose names shall be endorsed on the back side of the warrant, and returned into the Court, with the constable or constables' hand unto the same.

8. It is ordered, sentenced and decreed, that Windsor, Hartford, and Wethersfield shall have power, each town, to send four of their freemen as deputies to every General Court; and whatsoever other towns shall be hereafter added to this jurisdiction, they shall send so many deputies as the Court shall judge meet, a reasonable proportion to the number of freemen that are in the said towns being to be attended therein: which deputies shall have the power of the whole town, to give their votes and allowance to all such laws and orders as may be for the public good, and unto which the said towns are to be bound.

9. It is ordered and decreed, that the deputies thus chosen, shall have power and liberty to appoint a time and a place of meeting together before any General Court, to advise and consult of all such things as may concern the good of the public, as also to examine their own elections, whether according to the order; and if they, or the greatest part of them, find any election to be illegal, they may seclude such for [the] present from their meeting, and return the same, and their reasons, to the Court; and if it prove true, the Court may fine the party or parties so intruding, and the town, if they see cause, and give out a warrant to go to a new election in a legal way, either in part or in whole. Also the said deputies shall have power to fine any that shall be disorderly at their meetings, or for not coming in due time or place, according to appointment; and they may return the said fines into the Court, if it be refused to be paid, and the treasurer to take notice of it and to estreat or levy the same as he doth other fines.

10. It is ordered, sentenced and decreed, that every General Court, except such as, through neglect of the Governor and the greatest part of magistrates, the freemen themselves do call, shall consist of the Governor, or some one chosen to moderate the Court, and four other magistrates, at least, with the major part of the deputies of the several towns, legally chosen; and in case the freemen or major part of them, through neglect or refusal of the Governor and major part of the magistrates, shall call a Court, it shall consist of the major part of freemen that are present, or their deputies, with a Moderator chosen by them: in which said General Courts shall consist the supreme power of the Commonwealth; and they only shall have power to make laws or repeal them; to grant levies; to admit of freemen; dispose of lands undisposed of, to several towns or persons; and also shall have power to call either Court or magistrate or any other person whatsoever into question for any misdemeanor, and may for just causes displace, or deal otherwise, according to the nature of the offence; and also may deal in any other matter that concerns the good of this Commonwealth, except election of magistrates, which shall be done by the whole body of freemen. In which Court the Governor or Moderator shall have power to order the Court, to give liberty of speech, and silence unseasonable and disorderly speakings; to put all things to vote; and in case the vote be equal, to have the casting voice. But none of these Courts shall be adjourned or dissolved without the consent of the major part of the Court.

11. It is ordered, sentenced and decreed, that when any General Court, upon the occasions of the Commonwealth, have agreed upon any sum or sums of money to be levied upon the several towns within this jurisdiction, that a Committee be chosen to set out and appoint what shall be the proportion of every town to pay of the said levy; provided, the Committees be made up of an equal number out of each town.

14th January, 1638, the eleven orders abovesaid are voted.

ARTICLES OF CONFEDERATION OF 1643: (NEW ENGLAND CONFEDERATION).

[Modernized].

Articles of Confederation Between the Plantations under the Government of Massachusetts; the Plantations under the Government of New-Plymouth; the Plantations under the Government of Connecticut; and the Government of New-Haven; with the Plantations in Combination Therewith.

Whereas we all came into these parts of America with one and the same end and aim, namely, to advance the kingdom of our Lord Jesus Christ, and to enjoy the liberties of the Gospel in purity with peace; and whereas in our settling, by wise providence of God, we are further dispersed upon the seacoasts and rivers than was at first intended, so that we cannot, according to our desires, with convenience communicate in one government and jurisdiction; and

whereas we live encompassed with people of several nations and strange languages, which hereafter may prove injurious to us and our posterity; and forasmuch as the natives have formerly committed sundry insolencies and outrages upon several plantations of the English, and have of late combined themselves against us; and seeing, by reason of those distractions in England, which they have heard of, and by which they know we are hindered from that humble way of seeking advice or reaping those comfortable fruits of protection which at other times we might well expect; we therefore do conceive it our bounden duty, without delay, to enter into a present consociation amongst ourselves for mutual help and strength, in all our future concernments, that as in nation and religion, so in other respects, we be and continue one, according to the tenor and true meaning of the ensuing Articles.

1. Wherefore it is fully agreed and concluded by and between the parties or jurisdictions above named, and they jointly and severally do by these presents agree and conclude, that they all be, and henceforth be called by, the name of The United Colonies of New England.

2. The said United Colonies, for themselves and their posterities, do jointly and severally hereby enter into a firm and perpetual league of friendship and amity for offence and defence, mutual advice and succor upon all just occasions, both for preserving and propagating the truth of the Gospel, and for their own mutual safety and welfare.

3. It is further agreed that the plantations which at present are, or hereafter shall be, settled within the limits of the Massachusetts, shall be forever under the Massachusetts, and shall have peculiar jurisdiction among themselves in all cases, as an entire body; and that Plymouth, Connecticut, and New-Haven shall, each of them, have peculiar jurisdiction and government within their limits and in reference to the plantations which already are settled or shall hereafter be erected or shall settle within their limits, respectively: provided, that no other jurisdiction shall hereafter be taken in as a distinct head or member of this Confederation nor shall any other plantation or jurisdiction in present being, and not already in combination or under the jurisdiction of any of these confederates be received by any of them nor shall any two of the confederates join in one jurisdiction, without consent of the rest; which consent to be interpreted as is expressed in the sixth Article ensuing.

4. It is by these confederates agreed, that the charge of all just wars, whether offensive or defensive, upon what part or member of this Confederation soever they fall, shall, both in men, provisions, and all other disbursements, be borne by all the parts of this Confederation in different proportions according to their different abilities, in manner following: namely, that the Commissioners for each jurisdiction, from time to time, as there shall be occasion, bring a true account and number of all their males in every plantation or any way belonging to or under their several jurisdictions, of what quality or condition soever they be, from sixteen years old to sixty, being inhabitants there; and that according to the different numbers

which from time to time shall be found in each jurisdiction upon a true and just account, the service of men and all charges of the war be borne by the poll; each jurisdiction or plantation being left to their own just course and custom of rating themselves and people according to their different estates, with due respects to their qualities and exemptions amongst themselves, though the confederates take no notice of any such privilege; and that according to their different charge of each jurisdiction and plantation, the whole advantage of the war, if it please God to bless their endeavors, whether it be in lands, goods, or persons, shall be proportionately divided among the said confederates.

5. It is further agreed, that if these jurisdictions, or any plantation under or in combination with them, be invaded by any enemy whomsoever: upon notice and request of any three magistrates of that jurisdiction so invaded, the rest of the confederates, without any further meeting or expostulation, shall forthwith send aid to the confederate in danger, but in different proportion; namely, the Massachusetts an hundred men sufficiently armed and provided for such a service and journey, and each of the rest, forty-five, so armed and provided; or any lesser number, if less be required, according to this proportion. But if such confederate in danger may be supplied by their next confederates not exceeding the number hereby agreed, they may crave help there, and seek no further for the present; the charge to be borne as in this Article is expressed, and at the return to be victualed and supplied with powder and shot for their journey, if there be need, by that jurisdiction which employed or sent for them. But none of the jurisdictions to exceed these numbers till, by a meeting of the Commissioners for this Confederation, a greater aid appear necessary. And this proportion to continue till, upon knowledge of greater numbers in each jurisdiction, which shall be brought to the next meeting, some other proportion be ordered. But in such case of sending men for present aid, whether before or after such order or alteration, it is agreed, that at the meeting of the Commissioners for this Confederation, the cause of such war or invasion be duly considered; and if it appear that the fault lay in the parties so invaded, that then that jurisdiction or plantation make just satisfaction both to the invaders whom they have injured, and bear all the charges of the war themselves, without requiring any allowance from the rest of the confederates towards the same. And further, that if any jurisdiction see any danger of any invasion approaching, and there be time for a meeting, that in such a case three magistrates of that jurisdiction may summon a meeting at such convenient place as themselves shall think meet, to consider and provide against the threatened danger; provided, when they are met, they may remove to what place they please; only, whilst any of these four confederates have but three magistrates in their jurisdiction, their request or summons from any two of them shall be accounted of equal force with the three mentioned in both the clauses of this Article, till there be an increase of magistrates there.

6. It is also agreed that for the managing and concluding of all

affairs proper and concerning the whole confederation, two Commissioners shall be chosen by and out of each of these four jurisdictions, namely, two for the Massachusetts; two for Plymouth; two for Connecticut, and two for New-Haven, being all in church fellowship with us: which shall bring full power from their several General Courts respectively, to hear, examine, weigh and determine all affairs of war or peace, leagues, aids, charges, and numbers of men for war, divisions of spoils, and whatsoever is gotten by conquest; receiving of more confederates or plantations into combination with any of the confederates, and all things of like nature which are the proper concomitants or consequences of such a confederation, for amity, offence and defence; not intermeddling with the government of any of the jurisdictions: which by the third Article is preserved entirely to themselves. But if these eight Commissioners, when they meet, shall not all agree, yet it [is] concluded that any six of the eight, agreeing, shall have power to settle and determine the business in question. But if six do not agree, that then such propositions, with their reasons, so far as they have been debated, be sent and referred to the four General Courts, viz: the Massachusetts, Plymouth, Connecticut, and New-Haven; and if at all the said General Courts the business so referred be concluded, then to be prosecuted by the confederates and all their members. It was further agreed that these eight Commissioners shall meet once every year, besides extraordinary meetings according to the fifth Article, to consider, treat and conclude of all affairs belonging to this Confederation: which meeting shall ever be the first Thursday in September. And that the next meeting after the date of these presents, which shall be accounted the second meeting, shall be at Boston in the Massachusetts; the third at Hartford; the fourth at New-Haven; the fifth at Plymouth; and so in course, successively, if in the mean time some middle place be not found out and agreed on, which may be commodious for all the jurisdictions.

7. It is further agreed, that at each meeting of these eight Commissioners, whether ordinary or extraordinary, they, all six of them agreeing as before, may choose a President out of themselves, whose office and work shall be to take care and direct for order and a comely carrying on of all proceedings in the present meeting; but he shall be invested with no such power or respect as by which he shall hinder the propounding or progress of any business, or any may cast the scales otherwise than in the precedent Article is agreed.

8. It is also agreed, that the Commissioners for this Confederation, hereafter, at their meetings, whether ordinary or extraordinary, as they may have commission or opportunity, do endeavor to frame and establish agreements and orders in general cases of a civil nature wherein all the plantations are interested, for the preserving of peace amongst themselves, and preventing, as much as may be, all occasions of war or difference with others: as, about the free and speedy passage of justice in every jurisdiction to all the confederates, equally as to their own; not receiving those that remove from one plantation to another without due certificate; how all the jurisdictions may carry towards the Indians, that they neither grow insolent, nor be in-

jured without due satisfaction; lest war break in upon the confederates, through such miscarriages. It is also agreed that if any servant run away from his master into another of these confederated jurisdictions, that in such case, upon the certificate of one magistrate in the jurisdiction out of which the said servant fled, or upon other due proof, the said servant shall be delivered either to his master or any other that pursues and brings such certificate or proof. And that upon the escape of any prisoner whatsoever, or fugitive for any criminal cause, whether breaking prison, or getting from the officer, or otherwise escaping; upon the certificate of two magistrates of the jurisdiction out of which the escape is made, that he was a prisoner or such an offender at the time of the escape, they magistrates, or some of them of that jurisdiction where for the present the said prisoner or fugitive abideth, shall forthwith grant such a warrant as the case will bear, for the apprehending of any such person and the delivering of him into the hands of the officer or other person who pursues him. And if there be help required for the safe returning of any such offender, then it shall be granted to him that craves the same, he paying the charges thereof.

9. And for that the justest wars may be of dangerous consequence, especially to the smaller plantations in these United Colonies, it is agreed that neither the Massachusetts, Plymouth, Connecticut, nor New-Haven, nor any member of any of them, shall at any time hereafter begin, undertake, or engage themselves or this Confederation or any part thereof in, any war whatsoever, (sudden exigents, with the necessary consequents thereof excepted which are also to be moderated as much as the case will permit), without the consent and agreement of the forementioned eight Commissioners, or at the least, six of them, as in the sixth Article provided. And that no charge be required of any of they confederates, in case of a defensive war, till the said Commissioners have met, and approved the justice of the war, and have agreed upon the sum of money to be levied: which sum is then to be paid by the several confederates in proportion, according to the fourth Article.

10. That in extraordinary occasions, when meetings are summoned by three magistrates of any jurisdiction, or two, as in the fifth Article, if any of the Commissioners come not, due warning being given or sent, it is agreed that four of the Commissioners shall have power to direct a war which cannot be delayed, and to send for due proportions of men out of each jurisdiction, as well as six might do if all met; but not less than six shall determine the justice of the war, or allow the demands or bills of charges, or cause any levies to be made for the same.

11. It is further agreed, that if any of the confederates shall hereafter break any of these present Articles, or be any other ways injurious to any one of the other jurisdictions, such breach of agreement, or injury, shall be duly considered and ordered by the Commissioners for the other jurisdiction: that both peace and this present Confederation may be entirely preserved without violation.

12. Lastly, this perpetual Confederation and the several Articles

thereof being read and seriously considered, both by the General Court for the Massachusetts and by the Commissioners for Plymouth, Connecticut, and New-Haven, were fully allowed and confirmed by three of the forenamed confederates, namely, the Massachusetts, Connecticut, and New-Haven; only the Commissioners for Plymouth, having no commission to conclude, desired respite till they might advise with their General Court; whereupon it was agreed and concluded by the said Court of the Massachusetts, and the Commissioners for the other two confederates, that if Plymouth consent, then the whole treaty, as it stands in these present Articles, is, and shall continue, firm and stable, without alteration. But if Plymouth come not in, yet the other three confederates do by these presents confirm the whole Confederation and the Articles thereof; only in September next, when the second meeting of the Commissioners is to be at Boston, new consideration may be taken of the sixth Article, which concerns number of Commissioners for meeting and concluding the affairs of this Confederation, to the satisfaction of the Court of the Massachusetts and the Commissioners for the other two confederates; but the rest to stand unquestioned.

In the testimony whereof, the General Court of the Massachusetts, by their Secretary, and the Commissioners for Connecticut and New-Haven, have subscribed these present Articles this nineteenth of the third month, commonly called May, Anno Dom: 1643.

At a meeting of the Commissioners for the Confederation, held at Boston the seventh of Sept: it appearing that the General Court of New-Plymouth and the several townships thereof have read and considered and approved these Articles of Confederation; as appeareth by commission from their General Court, bearing date the 29th of August, 1643, to Mr. Edward Winslow and Mr. William Collier, to ratify and confirm the same on their behalfs: We, therefore, the Commissioners for the Massachusetts, Connecticut, and New-Haven, do also for our several governments subscribe unto them.

John Winthrop, Gov'r of the Massachusetts.
Tho: Dudley.
Geo. Fenwick.
Theoph: Eaton.
Edwa: Hopkins.
Thomas Gregson.

PENN'S PLAN, 1696-7.

A brief and plain scheme how the English Colonies in the North parts of America, viz: Boston, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia and Carolina, may be made more useful to the Crown, and one another's peace and safety with an universal concurrence.

1. That the several Colonies before mentioned do meet once a year, and oftener if need be, during the war, and at least once in two years in times of peace, by their Stated and appointed Deputies, to debate and resolve of such measures as are most advisable for their better understanding, and the public tranquility and safety.

2. That in order to it two persons well qualified for sense, sobriety and substance be appointed by each Province as their Representatives or Deputies which in the whole make the Congress to consist of twenty persons.

3. That the King's Commissioners for that purpose specially appointed shall have their Chair and preside in the said Congress.

4. That they shall meet as near as conveniently may be to the most central Colony for ease of the Deputies.

5. Since that may in all probability, be New York, both because it is near the center of the Colonies and for that it is a frontier and in the King's nomination, the Governor of that Colony may therefore also be the King's High Commissioner during the Session after the manner of Scotland.

6. That their business shall be to hear and adjust all matters of complaint or differences between Province and Province, as, 1st where persons quit their own Province and go to another, that they may avoid their just debts though they be able to pay them, 2nd where offenders fly justice, or justice cannot well be had upon such offenders in the Provinces that entertain them; 3d to prevent or cure injuries in point of commerce; 4th to consider of ways and means to support the union and safety of these Provinces against the public enemies. In which Congress the quotas of men and charges will be much easier and more equally set, than it is possible for any establishment made here to do; for the Provinces, knowing their own condition and one another's, can debate that matter with more freedom and satisfaction and better adjust and balance their affairs in all respects for their common safety.

7. That in times of war the King's High Commissioner shall be general or Chief Commander of the several quotas upon service against the common enemy, as he shall be advised, for the good and benefit of the whole.

COXE'S PLAN, 1722.

The only expedient I can at present think of, or shall presume to mention (with the utmost deference to His Majesty and His Ministers) to help and obviate the absurdities and inconveniences, and apply a remedy to them, is, that all the Colonies appertaining to the Crown of Great Britain on the Northern Continent of America, be united under a legal, regular and firm establishment; over which, it is proposed, a Lieutenant, or Supreme Governor, may be constituted, and appointed to preside on the spot, to whom the Governors of each Colony shall be subordinate.

It is further humbly proposed, That two Deputies shall be annually elected by the Council and Assembly of each Province, who are to be in the nature of a Great Council, or General Convention of the Estates, of the Colonies; and by the order, consent, or approbation of the Lieutenant or Governor General, shall meet together, consult and advise for the good of the whole; settle and appoint particular quotas or proportions of money, men, provisions, etc., that each respective

Government is to raise for their mutual defence and safety, as well as, if necessary, for offence and invasion of their enemies; in all which cases the Governor General or Lieutenant is to have a negative; but not to enact anything without their concurrence, or that of the majority of them.

The quota or proportion as above allotted and charged on each Colony, may, nevertheless, be levied and raised by its own Assembly, in such manner as they shall judge most easy and convenient, and the circumstances of their affairs will permit.

Other jurisdictions, powers and authorities respecting the Honor of His Majesty, the interest of the Plantations, and the liberty and property of the proprietors, traders, planters, and inhabitants in them, may be vested in and cognizable by the aforesaid Governor General or Lieutenant and Grand Convention of the Estates, according to the laws of England, but are not thought fit to be touched on or inserted here; this proposal being general, and with all humility submitted to the consideration of our superiors, who may improve, model, or reject it, as they in their wisdom shall judge proper.

ALBANY CONVENTION PLAN (FRANKLIN'S PLAN), 1754.

[Omitting the accompanying Explanatory Notes.]

It is proposed, that humble application be made for an act of Parliament of Great Britain, by virtue of which one general government may be formed in America, including all the said Colonies, within and under which government each Colony may retain its present constitution, except in the particulars wherein a change may be directed by the said act, as hereafter follows.

That the said general government be administered by a President-General, to be appointed and supported by the crown, and a Grand Council, to be chosen by the representatives of the people of the several Colonies met in their respective assemblies.

That within — months after the passing such act, the House of Representatives that happen to be sitting within that time, or that shall be especially for that purpose convened, may and shall choose members for the Grand Council, in the following proportion, that is to say,

Massachusetts Bay,	7
New Hampshire,	2
Connecticut,	5
Rhode Island,	2
New York,	4
New Jersey,	3
Pennsylvania,	6
Maryland,	4
Virginia,	7
North Carolina,	4
South Carolina,	4
	48

—who shall meet for the first time at the city of Philadelphia in Pennsylvania, being called by the President-General as soon as conveniently may be after his appointment.

That there shall be a new election of the members of the Grand Council every three years; and, on the death or resignation of any member, his place should be supplied by a new choice at the next sitting of the Assembly of the Colony he represented.

That after the first three years, when the proportion of money arising out of each Colony to the general treasury can be known, the number of members to be chosen for each Colony shall, from time to time, in all ensuing elections, be regulated by that proportion, yet so as that the number to be chosen by any one Province be not more than seven, nor less than two.

That the Grand Council shall meet once in every year, and oftener if occasion require, at such time and place as they shall adjourn to at the last preceding meeting, or as they shall be called to meet at by the President-General on any emergency; he having first obtained in writing the consent of seven of the members to such call, and sent due and timely notice to the whole.

That the Grand Council have power to choose their speaker; and shall neither be dissolved, prorogued, nor continued sitting longer than six weeks at one time, without their own consent or the special command of the crown.

That the members of the Grand Council shall be allowed for their service ten shillings sterling per diem, during their session and journey to and from the place of meeting; twenty miles to be reckoned a day's journey.

That the assent of the President-General be requisite to all acts of the Grand Council, and that it be his office and duty to cause them to be carried into execution.

That the President-General, with the advice of the Grand Council, hold or direct all Indian treaties, in which the general interest of the Colonies may be concerned; and make peace or declare war with Indian nations.

That they make such laws as they judge necessary for regulating Indian trade.

That they make all purchases from Indians, for the crown, of lands not now within the bounds of particular Colonies, or that shall not be within their bounds when some of them are reduced to more convenient dimensions.

That they make new settlements on such purchases, by granting lands in the King's name, reserving a quitrent to the crown for the use of the general treasury.

That they make laws for regulating and governing such new settlements, till the crown shall think fit to form them into particular governments.

That they raise and pay soldiers and build forts for the defence of any of the Colonies, and equip vessels of force to guard the coasts and protect the trade on the ocean, lakes, or great rivers; but they shall not impress men in any Colony, without the consent of the legislature.

That they may appoint a General Treasurer and Particular Treasurer in each government when necessary; and, from time to time, may order the sums in the treasuries of each government into the general treasury; or draw on them for special payments, as they find most convenient.

Yet no money to issue but by joint orders of the President-General and Grand Council; except where sums have been appropriated to particular purposes, and the President-General is previously empowered by an act to draw such sums.

That the general accounts shall be yearly settled and reported to the several Assemblies.

That a quorum of the Grand Council, empowered to act with the President-General, do consist of twenty-five members; among whom there shall be one or more from a majority of the Colonies.

That the laws made by them for the purposes aforesaid shall not he repugnant, but, as near as may be, agreeable, to the laws of England, and shall be transmitted to the King in Council for approbation, as soon as may be after their passing; and if not disapproved within three years after presentation, to remain in force.

That, in case of the death of the President-General, the Speaker of the Grand Council for the time being shall succeed, and be vested with the same powers and authorities, to continue till the King's pleasure be known.

That all military commission officers, whether for land or sea service, to act under this general constitution, shall be nominated by the President-General; but the approbation of the Grand Council is to be obtained, before they receive their commissions. And all civil officers are to be nominated by the Grand Council, and to receive the President-General's approbation before they officiate.

But, in case of vacancy by death or removal of any officer, civil or military, under this constitution, the Governor of the Province in which such vacancy happens may appoint, till the pleasure of the President-General and Grand Council can be known.

That the particular military as well as civil establishments in each Colony remain in their present state, the general constitution notwithstanding; and that on sudden emergencies any Colony may defend itself, and lay the accounts of expense thence arising before the President-General and General Council, who may allow and order payment of the same, as far as they judge such accounts just and reasonable.

GALLOWAY'S PLAN, 1774-5.

That a British and American legislature, for regulating the administration of the general affairs of America, be proposed and established in America, including all the said colonies; within, and under which government, each colony shall retain its present constitution, and powers of regulating and governing its own internal police, in all cases whatever.

That the said government be administered by a President-General,

to be appointed by the King, and a Grand Council to be chosen by the Representatives of the people of the several colonies, in their respective assemblies, once in every three years.

That the several assemblies shall choose members for the grand council in the following proportions, viz: [the names of the several colonies, with blank spaces for amounts].

Who shall meet at the city of ——— for the first time, being called by the President-General, as soon as conveniently may be after his appointment.

That there shall be a new election of members for the Grand Council every three years; and on the death, removal or resignation of any member, his place shall be supplied by a new choice, at the next sitting of Assembly of the Colony he represented.

That the Grand Council shall meet once in every year, if they shall think it necessary, and oftener, if occasion shall require, at such time and such place as they shall adjourn to at the last preceding meeting, or as they shall be called to meet at, by the President-General, on any emergency.

That the Grand Council shall have power to choose their Speaker, and shall hold and exercise all the like rights, liberties and privileges, as are held and exercised by and in the House of Commons of Great Britain.

That the President-General shall hold his office during the pleasure of the King, and his assent shall be requisite to all acts of the Grand Council, and it shall be his office and duty to cause them to be carried into execution.

That the President-General, by and with the advice and consent of the Grand Council, hold and exercise all the legislative rights, powers, and authorities, necessary for regulating and administering all the general policies and affairs of the colonies, in which Great Britain and the colonies or any of them; the colonies in general; or more than one colony, are in any manner concerned, as well civil and criminal as commercial.

That the said President-General and the Grand Council be an inferior and distinct branch of the British legislature, united and incorporated with it, for the aforesaid general purposes; and that any of the said general regulations may originate and be formed and digested, either in the Parliament of Great Britain, or in the said Grand Council, and being prepared, transmitted to the other for their approbation or dissent; and that the assent of both shall be requisite to the validity of all such general acts or statutes.

That in time of war, all bills for granting aid to the crown, prepared by the Grand Council, and approved by the President-General, shall be valid and passed into a law, without the assent of the British Parliament.

REVOLUTIONARY COLONY GOVERNMENTAL ESTABLISHMENTS OF HIGHER PLANE, IN THE SEVERAL COLONIES, 1774-1776.

In respect of Revolutionary Governmental establishments of higher plane, conditions differed widely in the several Colonies, (other than Georgia), in the summer of 1774, both as among Colonies, and within the limits of one or another Colony. Certain conditions were, and others were not, common to the Colonies other than Georgia. The least degree of departure from de jure regularity was,—for reasons peculiar to those Colonies—in Rhode Island and in Connecticut, and we will, for convenience, deal first with those two Colonies.

Rhode Island and Connecticut.

In those two Colonies, respectively, the Charter, (differing, in that respect from the Charters of the other Colonies), provided for local choice of the whole governmental officiel, Executive, Legislative, and Judicial.

There being, therefore, no Governor, or Council, or Upper House, or Judges, of Crown appointment, it was natural that the actual official personnel of 1774 should be—and it was—in sympathy with (or not hostile to) the Resistant Movement, and the Colonial (Charter) Frame (or Form) of Government could, and, in fact did, proceed, in unbroken continuity into, and through, the Revolution. So much of the specific action of the various Branches as was, in character, aim, or operation, Resistant, was, of course—from the then dominant British point of view—illegal and void; their other action being legal and operative.[1]

In these two Colonies, therefore, there was never occasion for, and there consequently did not arise, as in the other Colonies, a Revolutionary de facto substitute governmental establishment, with disappearance of the de jure Charter governmental establishment; but the continuing Charter establishment, while serving de jure for ordinary local government, acted, at the same time, as occasion was, in the capacity of Resistant (or Revolutionary) governmental establishment.

When, in those Colonies, Charter regularity in form was not, from the nature of the case, applicable to a given Resistant or Revolutionary situation, there was, in general, not a violent and abrupt departure from regularity in form, but a mere pro tanto departure, or cy pres regularity. Thus, there being, of course, in the Charters, respectively, no text giving even color of authority for such action as that of choosing delegates to the General ("Continental") "Congress" of 1774, the Lower House in each of these two Colonies took that action, as the popular Branch.

There were, of necessity, in these, as in the other Colonies, various forms of necessary local (e. g., county or town) Revolutionary action, for which the Charter made no provision, even in form. This lack was supplied, in these, as in the other, Colonies, by Revolutionary local "Committees" of mere de facto status. This Committee system

1As in the seceding States, during our Civil War. See our §§ 154-160.

of Rhode Island and Connecticut, we have considered from the standpoint of the Colonies as a whole. We will here merely say, in this connection, that in Rhode Island and in Connecticut, the system of town, county, or other Resistant (or Revolutionary) committees, ascended, in a rude hierarchy, to a central Colony Committee, which acted alongside of, and in coöperation with, the central governmental establishment of de jure form.

The Remaining Colonies Other Than Georgia.

In the remaining Colonies, other than Georgia,[2] the situation was radically different.

In each of these Colonies, the Governor, and an Upper House, or Council, (or both) and in some of these Colonies, Judges, were appointed by, and held office at the pleasure of, the Crown. The result, in each of these Colonies, was: the appearance of a de facto central single-chamber body, exercising Legislative, Executive, and Judicial powers. In certain of these Colonies, this Revolutionary body was identical in membership with the Charter Lower House,—acting, however, now, not as such House, but as a Revolutionary body. In others of these Colonies, the Revolutionary body was independently constituted, in a manner entirely foreign to the Charter. There was, of course, no difference in legal character between these two classes of assemblages. In no Colony did the Charter give to the Lower House authority thus to act by itself; still less did it give to that House power to assume exclusive power, Legislative, Executive, and Judicial. When, therefore, in any Colony, the membership of the Lower House (less, of course, members of Loyalist sentiments), undertook to act by itself, with all these powers, it became a mere de facto body, as definitely as if it had originated in a popular Convention; and its identity (as far as that went) with a Charter Lower House,—in personnel, and in forms of choice of its members,—was a matter of form, not of substance.

There never arose, for and in respect of these Assemblages, any one settled class designation; and their respective self-applied designations were plainly looked upon as informal, and rather as descriptive terms than as titles. Variations of them were in constant use, even in formal writings. Even in the Proceedings of the Continental Congress, the central Revolutionary body of a given Colony was not always given its local title or designation. The term "Convention" (which, like "Congress" had at that time, pretty nearly its etymological sense of "assemblage" and, of course, but little of our modern American special meaning) was perhaps the most common generic term.[3]

2As to Georgia, see below.

3"* * * the provincial conventions of Massachusetts and New Hampshire, and the government of Rhode Island." (Cont. Cong., June 26, 1775.)

"Where in any Colony a militia is already formed under regulations approved by the convention of such colony, or such assemblages as are annually elective, we refer to the discretion of such convention or assembly * * *." (Cont. Cong., July 18, 1775.)

* * * the "provincial convention of Massachusetts" (although dealing with a Massachusetts Resolution headed "In Provincial Congress" (Cont. Cong., June 2, 1775).

* * * "the assembly of Convention" (of North Carolina) (Cont. Cong., June 26 1775).

The originals of these bodies may probably be said to have been the early Committees of Correspondence, as they were called,—which, without assumption of actual governmental functions, were the earliest instruments in precipitating the Revolution, and in initiating Colonial Union for Resistance.

In the ten Colonies, now in question, the regular Courts, as a rule, ceased to sit; no process was executed; no taxes were assessed; and the Revolutionary bodies took from such local de jure Colonial officials as held over, (as, sheriffs and tax-collectors), moneys in their hands, doing this under claim of de facto substitution of themselves for the de jure authorities.

GEORGIA.

In Georgia, there was a Revolutionary "Provincial Congress", so-called; but the pre-Revolutionary and Revolutionary activity was local.

CHOICE OF DELEGATES TO THE FIRST, AND TO THE SECOND, SO-CALLED CONTINENTAL CONGRESS:—CREDENTIALS; INSTRUCTIONS.

A. THE FIRST CONGRESS, 1774.

The procedure, in different Colonies, varied.

In Massachusetts, Pennsylvania, and Rhode Island, the Lower House, (acting, in this respect, under no color of Charter authority, and acting, therefore, as a Committee of Safety) chose the delegates.

In Connecticut, the Charter Lower House (acting in like manner) fixed and formulated the instructions to be given to the delegates from that Colony, but (acting still in the same Revolutionary manner) deputed to the Colony Committee of Safety (called the "Committee of Correspondence") the fixing of the number, and the choice of delegates, and the actual issue of credentials, embodying the instructions prepared by the Lower House.

In South Carolina, a Revolutionary Committee chose the delegates and formulated the instructions, and the Charter Lower House endorsed this action.

In Virginia, Maryland and New Jersey, the Revolutionary County Committees called a Colony Convention, which chose and instructed the delegates.

In New Hampshire, the Town Revolutionary Committees chose delegates to a Colony Convention, by which delegates to the proposed general assemblage were chosen and instructed.

In Delaware, the Speaker of the Charter Lower House, in response to requests from the Revolutionary County Committees and from various local Committees or informal gatherings, summoned the members of both Houses to meet as a (Revolutionary) Convention. Such a Convention met, and chose and instructed delegates.

In New York, Colony uniformity was impossible, by reason of the actual division of the State into Revolutionary and Tory areas; and, in consequence, the procedure was highly irregular. Delegates were

chosen as follows: (a) in the town of New York, by "duly certified polls" "taken by proper persons" (evidently informal polls) in seven of the wards, five delegates were chosen for the town and county of New York; (b) the Committees of a number of "districts" arbitrarily formed in Westchester county; the Committee of the city and county of Albany; certain town Committees of certain such districts of Dutchess County; and certain other town Committees, adopted as their delegates the five persons chosen in the city of New York; (c) the Committees of Suffolk and Orange Counties, (and, subsequently, of King's County), respectively, chose separate single delegates.

As a result, there were four sets of delegates from New York, viz: a group of five representing the city and county of New York, the city and county of Albany, and the counties of Westchester and Dutchess, and three delegates representing respectively the counties of Suffolk, King's and Orange. These four sets of delegates were treated by the Congress as a single delegation, with one vote, representing the whole Colony; being left to adjust their own relations as among themselves.

Georgia was in no way represented in the Congress of 1774.

Credentials and instructions were issued: in Rhode Island by the (Charter) Governor; in Connecticut by the clerk of the Central Colony Committee; in Massachusetts, South Carolina, and Pennsylvania, by the clerk of the Lower (Charter) House; in New Jersey by the Chairmen of the County Committees; in Delaware, Maryland, and North Carolina by the Chairman or Clerk of the Convention. In New York there appear to have been no formal written credentials.

B. The Second Congress: 1775 to (nominally) March 4, 1789.

Practically the same course was followed as in the case of the first Congress, in respect of choice of Delegates.[4]

C. Instructions.

The common form of Instructions to Delegates, in the First and in the Second, Congress, was, with slight variation, as follows:

> At a Provincial Convention formed of Deputies from the City and County of New York, the City and County of Albany, and the Counties of Dutchess, Ulster, Orange, West-Chester, King's, and Suffolk, held at the City of New York, the twenty-second day of April, one thousand and seven hundred and seventy-five, for the purpose of appointing Delegates to represent the Colony of New York, in the next Continental Congress, to be held at Philadelphia, on the tenth Day of May next, [names of delegates] were unanimously elected Delegates, to represent this Colony at such Congress, with full power to them, or any five of them, to meet the Delegates from the other Colonies, and to concert and

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4The dates of election were as follows: Mass., Dec. 5, 1774, and Feb'y 6, 1775; Md., Dec. 8, 1774; Pa., Dec. 15, 1774, and May 6, 1775: So. Car., Jan. 11 and Feb. 3, 1775; N. J., Jan'y 24, 1775; Del., Mch. 16, 1775; Va., Mch. 20, 1775: No. Car., Apr. 5, and Apr. 7, 1775: N. Y., Apr. 22, 1775; R. I., May 7, 1775.
Feb'y 9, 1775, the parish (County) of St. John's in Georgia elected a delegate (Jour. Cont. Cong. II, 45). Subsequently, July 8, 1775, a Georgia "Convention" or "Provincial Assembly" met, and chose delegates. (See below.)

determine upon such measures, as shall be judged most effectual for the preservation and re-establishment of American rights and privileges, and for the restoration of harmony between Great Britain and the Colonies.

BILL OF RIGHTS OF THE FIRST CONTINENTAL CONGRESS (1774).

Whereupon the deputies so appointed being now assembled, in a full and free representation of these Colonies, taking into their most serious consideration, the best means of attaining the ends aforesaid, do, in the first place, as Englishmen, their ancestors, in like cases have usually done, for asserting and vindicating their rights and liberties, declare,

That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following Rights:

Resolved, 1. That they are entitled to life, liberty, and property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.

Resolved, 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects within the realm of England.

Resolved, 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them as their local and other circumstances enable them to exercise and enjoy.

Resolved, 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented, in the British Parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where the right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed. But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British Parliament as are bona fide restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America without their consent.

Resolved, 5. That the respective colonies are entitled to the common law of England, and more especially to the great and estimable privilege of being tried by their peers of the vicinage, according to the course of that law.

Resolved, 6. That they are entitled to the benefit of such of the English statutes as existed at the time of their colonization, and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

Resolved, 7. That these his majesty's colonies are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.

Resolved, 8. That they have a right peaceably to assemble, consider their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

Resolved, 9. That the keeping a standing army in these colonies, in time of peace, without the consent of the legislature of that colony in which such army is kept, is against law.

Resolved, 10. It is indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed, during pleasure, by the crown, is unconstitutional, dangerous, and destructive to the freedom of American legislation.

All and each of which the aforesaid deputies, in behalf of themselves and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered, or abridged, by any power whatever, without their own consent by their representatives in their several provincial legislatures.

In the course of our inquiry, we find many infringements and violations of the foregoing rights, which, from an earnest desire that harmony and mutual intercourse of affection and interest may be restored, we pass over for the present, and proceed to state such acts and measures as have been adopted since the last war, which demonstrate a system formed to enslave America.

Resolved, That the following acts of Parliament are infringements and violations of the rights of the colonists; and that the repeal of them is essentially necessary in order to restore harmony between Great Britain and the American colonies, viz: [numerous Acts specified].

* * * * * * * * *

Also, that the keeping a standing army in several of these colonies, in time of peace, without consent of the legislature of that colony in which such army is kept, is against law.

NON-INTERCOURSE RESOLUTION OF THE FIRST CONTINENTAL CONGRESS.

Resolved unanimously, That from and after the first day of December next, there be no importation into British America from Great Britain or Ireland, of any goods, wares or merchandizes whatsoever, or from any other place, of any such goods, wares or merchandizes, as shall have been exported from Great Britain or Ireland; and that no such goods, wares or merchandizes imported after the first day December next, be used or purchased.

THE ASSOCIATION, ETC.

We, his Majesty's most loyal subjects, the delegates of the several colonies of New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania; the three lower counties of New Castle, Kent, and Sussex, on Delaware; Maryland, Virginia, North Carolina, and South Carolina, deputed to represent them in a Continental Congress, held in the city of Philadelphia, on the 5th day of September, 1774, avowing our allegiance to his majesty, our affection and regard for our fellow-subjects in Great Britain and elsewhere; affected with the deepest anxiety, and most alarming apprehension, at those grievances and distresses, with which his Majesty's American subjects are oppressed; and having taken under our most serious deliberation the state of the whole continent, find, that the present unhappy situation of our affairs is occasioned by a ruinous system of colony administration, adopted by the British ministry about the year 1763, evidently calculated for inslaving these colonies, and, with them, the British empire. In prosecution of which system, various acts of parliament have been passed, for raising a revenue in America, for depriving the American subjects, in many instances, of the constitutional trial by jury, exposing their lives to danger, by directing a new and illegal trial beyond the seas for crimes alleged to have been committed in America: and in prosecution of the same system, several late, cruel, and oppressive acts have been passed, respecting the town of Boston and the Massachusetts Bay, and also an act for extending the province of Quebec, so as to border on the western frontiers of these colonies, establishing an arbitrary government therein, and discouraging the settlement of British subjects in that wide extended country; thus, by the influence of civil principles and ancient prejudices, to dispose the inhabitants to act with hostility against the free Protestant colonies, whenever a wicked ministry shall choose so to direct them.

To obtain redress of these grievances, which threaten destruction to the lives, liberty, and property of his majesty's subjects, in North America, we are of opinion, that a non-importation, non-consumption, and non-exportation agreement, faithfully adhered to, will prove the most speedy, effectual, and peaceable measure: and, therefore, we do, for ourselves, and the inhabitants of the several colonies, whom we represent, firmly agree and associate, under the sacred ties of virtue, honour and love of our country, as follows:

1. That from and after the first day of December next, we will not import, into British America, from Great Britain or Ireland, any goods, wares, or merchandise whatsoever, or from any other place, any such goods, wares, or merchandise as shall have been exported from Great Britain or Ireland; nor will we, after that day, import any East India tea from any part of the world; nor any molasses, syrups, panales, coffee, or pimento, from the British plantations or from Dominica; nor wines from Madeira, or the Western Islands; nor foreign indigo.

2. We will neither import, nor purchase any slave imported, after the first day of December next; after which time we will wholly

discontinue the slave trade, and will neither be concerned in it ourselves, nor will we hire our vessels nor sell our commodities or manufactures to those who are concerned in it.

3. As a non-consumption agreement, strictly adhered to, will be an effectual security for the observation of the non-importation, we, as above, solemnly agree and associate, that, from this day, we will not purchase or use any tea, imported on account of the East India Company, or any on which a duty hath been or shall be paid; and from and after the first day of March next, we will not purchase or use any East Indian tea whatever; nor will we, nor shall any person for or under us, purchase or use any of these goods, wares, or merchandise we have agreed not to import, which we shall know, or have cause to suspect, were imported after the first day of December, except such as come under the rules and directions of the tenth article hereafter mentioned.

4. The earnest desire we have, not to injure our fellow-subjects in Great Britain, Ireland, or the West Indies, induces us to suspend a non-exportation until the tenth day of September, 1775; at which time, if the said acts and parts of acts of the British parliament hereinafter mentioned are not repealed, we will not, directly or indirectly, export any merchandise or commodity whatsoever to Great Britain, Ireland, or the West Indies, except rice to Europe.

5. Such as are merchants, and use the British and Irish trade, will give orders, as soon as possible, to their factors, agents and correspondents, in Great Britain and Ireland, not to ship any goods to them, on any pretense whatsoever, as they cannot be received in America; and if any merchant, residing in Great Britain or Ireland, shall directly or indirectly ship any goods, wares, or merchandise, for America, in order to break the said non-importation agreement, or in any manner contravene the same, on such unworthy conduct being well attested, it ought to be made public; and, on the same being so done, we will not, from thenceforth, have any commercial connection with such merchant.

6. That such as are owners of vessels will give positive orders to their captains, or masters, not to receive on board their vessels any goods prohibited by the said non-importation agreement, on pain of immediate dismission from their service.

7. We will use our utmost endeavors to improve the breed of sheep, and increase their number to the greatest extent; and to that end, we will kill them as seldom as may be, especially those of the most profitable kind; nor will we export any to the West Indies or elsewhere; and those of us who are or may become overstocked with, or can conveniently spare, any sheep, will dispose of them to our neighbors, especially to the poorer sort, on moderate terms.

8. We will, in our several stations, encourage frugality, economy, and industry, and promote agriculture, arts and manufactures of this country, especially that of wool; and will discountenance and discourage every species of extravagance and dissipation, especially all horse-racing, and all kinds of gaming, cock-fighting, exhibitions of shows, plays, and other expensive diversions and entertainments;

and on the death of any relation or friend, none of us, or any of our families, will go into any further mourning-dress, than a black crape or ribbon on the arm or hat, for gentlemen, and a black ribbon and necklace for ladies, and we will discontinue the giving of gloves and scarfs at funerals.

9. Such as are venders of goods or merchandise will not take advantage of the scarcity of goods, that may be occasioned by this association, but will sell the same at the rates we have been respectively accustomed to do, for twelve months last past. And if any vender of goods or merchandise shall sell any such goods on higher terms, or shall, in any manner, or by any device whatsoever violate or depart from this agreement, no person ought, nor will any of us, deal with any such person, or his or her factor or agent, at any time thereafter, for any commodity whatever.

10. In case any merchant, trader, or other person, shall import any goods or merchandise, after the first day of December, and before the first day of February, next, the same ought forthwith, at the election of the owner, to be either re-shipped or delivered up to the committee of the county or town wherein they shall be imported, to be stored at the risk of the importer, until the non-importation agreement shall cease, or be sold under the direction of the committee aforesaid; and in the last-mentioned case, the owner or owners of such goods shall be reimbursed out of the sales, the first cost and charges, the profit, if any, to be applied towards relieving and employing such poor inhabitants of the town of Boston as are immediate sufferers by the Boston port-bill; and a particular account of all goods so returned, stored, or sold, to be inserted in the public papers; and if any goods or merchandise shall be imported after the said first day of February, the same ought forthwith to be sent back again, without breaking any of the packages thereof.

11. That a committee be chosen in every county, city, and town, by those who are qualified to vote for representatives in the legislature, whose business it shall be attentively to observe the conduct of all persons touching this association; and when it shall be made to appear, to the satisfaction of a majority of any such committee, that any person within the limits of their appointment has violated this association, that such majority do forthwith cause the truth of the case to be published in the gazette; to the end, that all such foes to the rights of British-America may be publicly known, and universally condemned as the enemies of American liberty; and thenceforth we respectively will break off all dealings with him or her.

12. That the committee of correspondence in the respective colonies do frequently inspect the entries of their custom-houses, and inform each other, from time to time, of the true state thereof, and of every other material circumstance that may occur relative to this association.

13. That all manufactures of this country be sold at reasonable prices, so that no undue advantage be taken of a future scarcity of goods.

14. And we do further agree and resolve, that we will have no

trade, commerce, dealings or intercourse whatsoever, with any colony or province, in North America, which shall not accede to, or which shall hereafter violate this association, but will hold them as unworthy of the rights of freemen, and as inimical to the liberties of their country.

And we do solemnly bind ourselves and our constituents, under the ties aforesaid, to adhere to this association, until such parts of the several acts of parliament passed since the close of the last war, as impose or continue duties on tea, wine, molasses, syrup, paneles, coffee, sugar, pimento, indigo, foreign paper, glass, and painters' colours, imported into America, and extend the powers of the admiralty courts beyond their ancient limits, deprive the American subject of trial by jury, authorize the judge's certificate to indemnify the prospector from damages, that he might otherwise be liable to from a trial by his peers, require oppressive security from a claimant of ships or goods seized, before he shall be allowed to defend his property, are repealed. * * * And until that part of the Act of * * * by which any persons charged with committing any of the offences therein described, in America, may be tried in any shire or county within the realm, is repealed * * * and until the four Acts, passed the last session of parliament, viz: that for stopping the port and blocking up the harbour of Boston * * * that for altering the charter and government of the Massachusetts Bay * * * and that which is entitled "An act for the better administration of justice, &c." * * * and that "for extending the limits of Quebec, * * *" are repealed. And we recommend it to the provincial conventions, and to the committees in the respective colonies, to establish such farther regulations as they may think proper, for carrying into execution this association.

The foregoing association being determined upon by the Congress, was ordered to be subscribed by the several members thereof; and thereupon, we have hereunto set our respective names accordingly.

In Congress, Philadelphia, October 20, 1774.

[Signatures].

THE WYOMING CONTROVERSY.

The Wyoming Valley, in the Northeastern part of what is now Pennsylvania, was claimed by Connecticut (Charter, 1662: "and in longitude" * * *) and by Pennsylvania (Charter, 1681: "The said lands extend Westward" * * *). Settlements had been made in the Valley from, and under sanction of, each of these Colonies. July 31, 1775, two petitions were laid before the Congress "respecting disputes between the people of Connecticut and Pennsylvania on lands lying on the waters of Susquehanna." Aug. 1, 1775, the matter of the petitions was debated. Sept. 30, 1775, the House of Assembly of Pennsylvania passed a Resolution as follows:

> "The house taking into consideration the several letters sent down yesterday by the Governor, acquainting him with the intrusion of a number of people into this province, under a pre-

tended claim of the colony of Connecticut, to the great annoyance of the good people of this province:

Resolved, That the delegates for this province, be specially directed to lay the same before the Congress, with the mischievous tendency the pursuing such measures will have, and procure the aid of that assembly to quiet the minds of the good people of this province, and prevent further intrusion or extension of settlements under the said claim, until the matter shall be determined by the King and Council, to whom both sides have submitted the dispute".

October 7, 1775, this Resolve was laid before the Congress. The matter was on that day referred to the delegates from the two Colonies, with a request that they report on a day specified. On that day, the delegates not being then ready to make a report, it was ordered that they meet forthwith and make a report "respecting the disputes between the inhabitants of these colonies on the lands in the forks of the Susquehanna".

October 9, 1775, the delegates from both Colonies announced that they were ready to report; and an early day was fixed for presenting their report; but, at the time appointed, October 11, they stated that they were not ready to report, and they were thereupon ordered to meet forthwith and prepare a report "respecting the disputes between the inhabitants of these colonies (Connecticut and Pennsylvania) on the lands in the forks of the Susquehanna". October 14, 1775, the Connecticut delegates informed the Congress

"That they had met some of the delegates for Pennsylvania, in order to take into consideration the matters referred to them, but not being able to come to any agreement with them, and as the disputes between the people of the two Colonies on the waters of the Susquehanna, had proceeded to bloodshed, and, as they apprehended, may be attended with very dangerous consequences, unless speedily prevented, they moved that a Committee be appointed out of the other Colonies, to take this matter into consideration, and report thereon to Congress".

October 17, the Congress resolved that a Committee of five be appointed

"to take into consideration the disputes between the people of Connecticut and Pennsylvania, and report what in their opinion is proper to be done by Congress."

November 4, the Congress passed a Resolution as follows:

"The Congress, taking into consideration the disputes between the people of Pennsylvania and Connecticut, on the waters of Susquehanna, came to the following resolution:

Whereas, a dispute subsists between some of the inhabitants of the Colony of Connecticut, settled under the claim of said colony, on the lands near Wyoming, on the Susquehanna river, and in the Delaware country, and the inhabitants settled under the claims of the proprietaries of Pennsylvania, which dispute, it

is apprehended, will, if not suspended during the present troubles in these colonies, be productive of pernicious consequences, which may be very prejudicial to the common interest of the United Colonies, therefore,

Resolved, That it is the opinion of this Congress, and it is accordingly recommended, that the contending parties immediately cease all hostilities, and avoid every appearance of force, until the dispute can be legally decided; that all property taken and detained be restored to the original owners; that no interruption be given by either party to the free passing and repassing of persons behaving themselves peaceably through said disputed territory, as well by land as water, without molestation of either person or property; that all persons seized and detained on account of said dispute, on either side, be dismissed and permitted to go to their respective homes; and that, things being put in the situation they were before the late unhappy contest, they continue to behave themselves peaceably on their respective possessions and improvements, until a legal decision can be had on said dispute, or this Congress shall take further order thereon; and nothing herein done shall be construed in prejudice of the claims of either party.

November 7, one of the Pennsylvania delegates brought a verbal message from the Assembly of Pennsylvania, desiring to know on what evidence the Congress grounded the apprehensions * * * expressed in the Resolution of November 4th", of hostilities being commenced at or near Wyoming, between the inhabitants of the colony of Pennsylvania and those of Connecticut.

November 10, a day was assigned by Congress

"for taking into consideration the Report of the Committee on the disputes between the people of Connecticut and Pennsylvania on the waters of Susquehanna".

By November 11, the Committee reported. November 27, after debate, the matter was re-committed to the Committee with an instruction

"to hear evidence on the possession and jurisdiction of the lands in dispute and reduce to writing such parts of the evidence * * * as they shall think proper, and lay the same before Congress".

December 18, sundry affidavits from Wyoming, relative to the disturbances there, between the people of Connecticut and Pennsylvania "were laid before Congress and read".

Prior to December 20, 1775, the Congress adopted a Resolution as follows:

"Whereas the colony of Connecticut has, by a certain act of their assembly, resolved that no further settlements be made on the lands disputed between them and Pennsylvania, without license from said assembly,

Resolved, That it be recommended to the colony of Connecticut

not to introduce any settlers on the said lands till the further order of this Congress, or until the said dispute shall be settled".

The Wyoming Massacre—resulting in a practical extermination by the Indians of the inhabitants of the Wyoming Valley—brought the controversy, for the time being, to an end, and it was never resumed before the Congress.

THE MATTER OF THE NEW HAMPSHIRE GRANTS.

The area which is now Vermont, was, for historical reasons, known, at an early period, as "The New Hampshire Grants." It was claimed by New York and New Hampshire. The inhabitants, however, claimed an independent status, and formed a Revolutionary organization of their own, and, May 8, 1776, petitioned Congress for recognition. Congress heard them through a committee.

May 30, 1776, the committee reported as follows:

> "The committee, to whom the petition address and remonstrance of the persons inhabiting that part of America, which is commonly called and known by the name of the New Hampshire grants, was referred, have examined the matter thereof, and come to the following resolution thereupon:
>
> Resolved, that it is the opinion of this committee, that it be recommend to the petitioners, for the present, to submit to the government of New York, and contribute their assistance, with their countrymen, in the contest between Great Britain and the united colonies; but that such submission ought not to prejudice the right of them or others to the lands in controversy, or any part of them, nor be construed to affirm or admit the jurisdiction of New York in and over that country; and, when the present Troubles are at an End the final Determination of their Right may be mutually referr'd to proper Judges".[1]

May 30, 1776, one Captain Allen presented to Congress a petition in behalf of the inhabitants of the New Hampshire Grants. June 4, it was resolved:

> "That Captain Allen have leave to withdraw the petition by him delivered, in behalf of the inhabitants of the New Hampshire Grants, he representing that he has left at home some papers and vouchers necessary to support the allegations therein contained".

THE DECLARATION OF INDEPENDENCE.

In Congress, July 4, 1776.

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA.

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with

[1] Now on file, in Papers of the Continental Congress No. 69, I, folios 31-43, 111, with an unsigned statement in the writing of Silas Deane. Jour. Cong. Libr. of Cong. Ed., III, p. 435, note.

another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for

that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our People, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislature.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For protecting them by a Mock Trial, from Punishment for any Murders which they should commit on the inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighboring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus

marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.

Nor have We been wanting in attention to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the United States of America, in General Congress Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority, of the good People of these Colonies, solemnly publish and declare, That these United Colonies, are, and of Right ought to be, Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

THE ARTICLES OF CONFEDERATION (1781).[1]

Articles of Confederation and Perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

ARTICLE I.—The style of this Confederacy shall be, "The United States of America."

ART. II.—Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.

ART. III.—The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon, them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

ART. IV.—The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union,

[1] I. E. effective 1781.

the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any State on the property of the United States or either of them. If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State shall flee from justice and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense. Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

ART. V.—For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the Legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year. No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States for which he, or another for his benefit, receives any salary, fees, or emolument of any kind. Each State shall maintain its own delegates in any meeting of the States and while they act as members of the Committee of the States. In determining questions in the United States in Congress assembled, each State shall have one vote. Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonment during the time of their going to and from, and attendance on, Congress, except for treason, felony, or breach of the peace.

ART. VI.—No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or

alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessel of war shall be kept up in time of peace by any State except such number only as shall be deemed necessary by the United States, in Congress assemhled, for the defense of such State or its trade, nor shall any body of forces be kept up by any State in time of peace, except such number only as, in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use in public stores a due number of field-pieces and tents, and a proper quantity of arms, ammunitions, and camp equipage.

No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States, in Congress assembled, can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States, in Congress assembled, and then only against the kingdom or state. and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States, in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled, shall determine otherwise.

ART. VII.—When land forces are raised by any State for the common defense, all officers of or under the rank of Colonel shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ART. VIII.—All charges of war, and all other expenses that shall be incurred for the common defense, or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common treasury, which shall he supplied by the several States in proportion to the value of all land within each State, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States, in Congress assembled, shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several

States, within the time agreed upon by the United States, in Congress assembled.

ART. IX.—The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made, whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatever; of establishing rules for deciding, in all cases, what captures on land and water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures; provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall neverthe-

less proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward." Provided, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they may respect such lands and the States which passed such grants, are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated; establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "A Committee of the States," and to consist of one delegate from each State, and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside; provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces,

and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requisition shall be binding; and thereupon the Legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled; but if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State, unless the Legislature of such State shall judge that such extra number can not be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared, and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled.

The United States, in Congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations as in their judgment require secresy; and the yeas and nays of the delegates of each State, on any question, shall be entered on the journal when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal except such parts as are above excepted, to lay before the Legislatures of the several States.

ART. X.—The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States, in Congress assembled, by the consent of nine States, shall, from time to time, think expedient to vest them with; provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the

voice of nine States in the Congress of the United States assembled is requisite.

ART. XI.—Canada, acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ART. XII.—All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ART. XIII.—Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

AND WHEREAS it hath pleased the great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress to approve of, and to authorize us to ratify, the said Articles of Confederation and perpetual Union, know ye, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in Congress assembled, on all questions which by the said Confederation are submitted to them; and that the Articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America.

[SIGNATURES].

THE ORDINANCE OF 1784.

[The original "Northwest" Ordinance: Covered, enlarged, and in terms repealed by the "Northwest Ordinance" of 1787, below].

Resolved, that so much of the territory ceded or to be ceded by individual states to the United States as is already purchased or shall

be purchased of the Indian inhabitants and offered for sale by Congress, shall be divided into distinct states, in the following manner, as nearly as such cessions will admit; that is to say, by parallels of latitude, so that each state shall comprehend from South to North two degrees of latitude beginning to count from the completion of thirty-one degrees North of the Equator; and by meridians of longitude, one of which shall pass through the lowest point of the rapids of Ohio, and the other through the Western Cape of the mouth of the Great Kanhaway, but the territory Eastward of this last meridian, between the Ohio, Lake Erie, and Pennsylvania; shall be one state, whatsoever may be its comprehension of latitude. That which may lie beyond the completion of the 45th degree between the said meridians shall make part of the state adjoining it on the South, and that part of the Ohio which is between the same meridians coinciding nearly with the parallel of 39 degrees shall be substituted so far in lieu of that parallel as a boundary line.

That the settlers on any territory so purchased and offered for sale shall, either on their own petition, or on the order of Congress, receive authority from them with appointments of time and place for their free males of full age, within the limits of their state, to meet together for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of the original states, so that such laws nevertheless shall be subject to alteration by their ordinary legislature; and to erect, subject to a like alteration, counties or townships for the election of members for their legislature.

That such temporary government shall only continue in force in any state until it shall have acquired 20,000 free inhabitants, when, giving due proof thereof to Congress, they shall receive from them authority with appointment of time and place to call a convention of representatives to establish a permanent Constitution and Government for themselves. Provided that both the temporary and permanent governments be established on these principles as their basis. 1. That they shall forever remain a part of this confederacy of the United States of America. 2. That in their persons, property and territory they shall be subject to the Government of the United States in Congress assembled, and to the articles of Confederation in all those cases in which the original states shall be so subject. 3. That they shall be subject to pay a part of the federal debts contracted or to be contracted, to be apportioned on them by Congress, according to the same common rule and measure, by which apportionments thereof shall be made on the other states. 4. That their respective Governments shall be in republican forms and shall admit no person to be a citizen who holds any hereditary title. 5. That after the year 1800 of the Christian æra, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes whereof the party shall have been convicted to have been personally guilty.

That whensoever any of the said states shall have, of free inhabitants, as many as shall then be in any one the least numerous of the thirteen original states, such state shall be admitted by its delegates

into the Congress of the United States on an equal footing with the said original states: provided nine States agree to such admission according to the reservation of the 11th of the articles of Confederation; and in order to adopt the said articles of confederation to the state of Congress when its numbers shall be thus increased, it shall be proposed to the legislatures of the states originally parties thereto, to require the assent of two-thirds of the United States in Congress assembled in all those cases wherein by the said articles the assent of nine states is now required; which being agreed to by them shall be binding on the new states. Until such admission by their delegates into Congress, any of the said states after the establishment of their temporary government shall have authority to keep a sitting member in Congress, with a right of debating, but not of voting.

That the preceding articles shall be formed into a charter of compact, shall be duly executed by the president of the United States in Congress assembled, under his hand and the seal of the United States, shall be promulgated and shall stand as fundamental constitutions between the thirteen original states and each of the several states now newly described, unalterable but by the joint consent of the United States in Congress assembled, and of the particular state within which such alteration is proposed to be made.

That measures not inconsistent with the principles of the Confederation and necessary for the preservation of peace and good order among the settlers in any of the said new states until they shall assume a temporary Government as aforesaid, may from time to time be taken by the United States in Congress assembled.

THE ORDINANCE OF 1787.

[The "Northwest" Ordinance, now commonly so-called].

AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO.

Be it ordained by the United States in Congress assembled, That the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Be it ordained by the authority aforesaid, That the estates, both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed, among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them: And where there shall be no children or descendants, then in equal parts to the next of kin in equal degree; and, among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parents' share; and there shall, in no case, be a distinction between kindred of the whole and half-blood; saving, in all cases, to the widow of the intestate her third part of

the real estate for life, and one-third part of the personal estate; and this law, relative to descents and dower, shall remain in full force until altered by the legislature of the district. And, until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her, in whom the estate may be (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose; and personal property may be transferred by delivery; saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskias, St. Vincents, and the neighboring villages who have heretofore professed themselves citizens of Virginia, their laws and customs, now in force among them, relative to the descent and conveyance of property.

Be it ordained by the authority aforesaid, That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein in 1000 acres of land, while in the exercise of his office.

There shall be appointed, from time to time, by Congress, a secretary, whose commission shall continue in force for four years unless sooner revoked; he shall reside in the district, and have a freehold estate therein in 500 acres of land, while in the exercise of his office; it shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his Executive department; and transmit authentic copies of such acts and proceedings, every six months, to the Secretary of Congress: There shall also be appointed a court to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction, and reside in the district and have each therein a freehold estate in 500 acres of land while in the exercise of their offices; and their commissions shall continue in force during good behavior.

The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Congress from time to time: which laws shall be in force in the district until the organization of the General Assembly therein, unless disapproved of by Congress; but, afterwards, the legislature shall have authority to alter them as they shall think fit.

The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below

the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Previous to the organization of the General Assembly, the governor shall appoint such magistrates and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same: After the General Assembly shall be organized, the powers and duties of the magistrates and other civil officers, shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

So soon as there shall be 5000 free male inhabitants of full age in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships to represent them in the General Assembly: Provided, That, for every 500 free male inhabitants, there shall be one representative, and so on progressively with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to 25; after which, the number and proportion of representatives shall be regulated by the legislature: Provided, That no person be eligible or qualified to act as a representative unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee simple, 200 acres of land within the same: Provided, also, That a freehold in 50 acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years residence in the district, shall be necessary to qualify a man as an elector of a representative.

The representatives thus elected, shall serve for the term of two years; and, in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead, to serve for the residue of the term.

The General Assembly, or Legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum: and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected, the governor shall appoint a time and place for them

to meet together; and, when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in 500 acres of land, and return their names to Congress; five of whom Congress shall appoint and commission to serve as aforesaid; and, whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress; one of whom Congress shall appoint and commission for the residue of the term. And every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress; five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives, shall have authority to make laws in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the General Assembly, when, in his opinion, it shall be expedient.

The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity and of office; the governor before the President of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating but not of voting during this temporary government.

And, for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory: to provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable, unless by common consent, to wit:

ART. 1st. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

ART. 2d. The inhabitants of the said territory shall always be en-

titled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed.

ART. 3d. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time, be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

ART. 4th. The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts contracted or to be contracted, and a proportional part of the expenses of government, to be apportioned on them by Congress according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes, for paying their proportion, shall be laid and levied by the authority and direction of the legislatures of the district or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States; and, in no case, shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United

States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty, therefor.

ART. 5th. There shall be formed in the said territory, not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to wit: The Western State in the said territory, shall be bounded by the Mississippi, the Ohio, and Wabash rivers; a direct line drawn from the Wabash and Post St. Vincent's, due North, to the territorial line between the United States and Canada; and, by the said territorial line, to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincent's, to the Ohio; by the Ohio, by a direct line, drawn due North from the mouth of the Great Miami, to the said territorial line, and by the said territorial line. The Eastern State shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: Provided, however, and it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies North of an East and West line drawn through the Southerly bend or extreme of lake Michigan. And, whenever any of the said States shall have 60,000 free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent constitution and State government: Provided, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than 60,000.

ART. 6th. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.[1]

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[1] Finally agreed to, and effective, March 1, 1781.

THE CONSTITUTION OF THE UNITED STATES, AS ORIGINALLY EFFECTIVE, AND EARLIER TEXTS: —GENERAL VIEW.

The early Colonial texts presented above provided a stock of material, substantive and textual, fully and broadly drawn upon, in State Constitutions, and in the successive Federal instruments, prior to the Constitution, presented in this Appendix. The process of borrowing and absorption reached its culmination in the text of the Constitution of the United States.

In presenting, in the Table below, earlier texts, we have, in general, cited texts nearest in time to the Constitution; but many, if not most, of the texts thus cited were derived from the Colonial texts above presented.

For reasons stated above, State texts, cited below, were, in many instances, common to a number of State Constitutions, or to the State Constitutions generally,—in identical terms, or with mere verbal change. In such case, it has been thought sufficient to cite some one text.

During the period 1776-1787, most of the States,—acting with the approval of the Congress of that period—adopted Written State Constitutions severally comprising (in a single instrument, or, bi-textually, in separate instruments) a Bill of Rights and a Frame of Government. The respective Bills of Rights were much alike. In respect, however, of the Frame of Government, there was a very considerable degree of diversity,—different States continuing, very largely, forms and institutions long familiar to them, respectively, under their respective Colonial Charters. In other respects, however, there had, in 1787, been a gradual advance, since 1776, both within particular States, and among the States generally, in textual, and in political, symmetry and elaboration. The most highly elaborated form was, in 1787, fairly represented by the Massachusetts Constitution of 1780 (still, with some Amendments, in force), comprising a Bill ("Declaration") of Rights, and a Frame of Government. The initial working draft of the Constitutional Convention (Journal of the Convention, ad init.), was, in respect of structural scheme, quite plainly based upon the later types of State Constitution, in point of construction and arrangement. In point of specific text, the Constitution took over so much as was pertinent of the then existing Federal Written Constitution or Frame of Government (the Articles of Confederation, effective 1781), and then proceeded chiefly by drawing upon text of various State Constitutions. Many such texts were repeated over and over again, in different State Constitutions, with more or less verbal change; in so far, it has been thought sufficient to cite some one text, without close regard to precise textual form, as among equivalent texts.

The Constitution of the United States, as finally settled by the Convention and as finally ratified and adopted, while incorporating into its text certain Bills of Rights provisions operative as against the United States (habeas corpus; bills of attainder; ex post facto laws, Art. I, § 9; trial by jury in Criminal cases; vicinage, Art. III, § 2)

made a radical departure from the traditional form of State Constitution of the period, in not containing (uni-textually or bi-textually) a formal Bill of Rights,—the omission representing, perhaps, the view (see our § 24) of then present and then prospective operation of the Declaration of Independence as, (in one of its aspects: see our § 13), such a Bill of Rights. The omission would—as the event proved—have been fatal, but for a universal informal agreement throughout the States, (pending the question of ratification), shortly carried into effect by the adoption of the first ten Amendments, which constitute a Bill of Rights operative as against Federal action. (See our § 18.)

In so far as the Constitution of the United States took over text of the then existing Federal Constitution or Frame of Government, (the Articles of Confederation), such text, thus taken over, was not, in legal effect, re-enacted, by the Constitution, but was, in legal effect, (in accordance with a familiar elementary principle),[1] simply continued in force: the Constitution of the United States being, pro tanto, a mere Amendment of the Articles of Confederation. So of the texts taken over from the Ordinance of 1787 (which ante-dated the final action of the Convention). Indeed, the Constitution of the United States was prospectively viewed (and was, in terms, prospectively characterized) by the Continental Congress, as an Amendment of the Articles of Confederation, and was constantly so characterized in the discussions of the period,[2] and, in legal effect, is such: a contrary view making it violative of the Perpetual Union texts and the Amendment text of that instrument.

In so far as the text of the Constitution took over State text, (literally, or with mere verbal change), it took such text over, (under an elementary Common Law principle of Interpretation, adopted by the Constitution),[3] with the meaning which it had in its original setting: as, for example, in respect of the various Common Law qualifications of State text dealing with allotment of powers as among the three great Branches, Legislative, Executive, and Judicial:[4] subject to the considerations: (a) that, in many instances, technical Common Law expressions, (as, "impeachment"; "jury"; "ex post facto"; "bills of attainder"), or reference to Common Law institutions, are capable of being viewed as having been taken directly from the Common Law, although through the textual medium of a State Constitution; (b) that many texts taken over were common to two or more State Constitutions, and are thus not traceable to any one State Constitution, but look to the general Common Law conception in question.

Textual derivation, (above, and in the Table below, referred to), simply means: that the Constitutional Convention was composed of men who, as a class, had, over the period 1776-1787, been engaged in forming, and in perfecting, State Constitutions; and that these men brought to the Convention their experience and equipment, gained in

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1McClaughry v. Deming, 186 U. S. 49: S 22:786; L 46:1049: dealing with a pre-Constitution Act of the Continental Congress. but here pertinent and illustrative.

2E. g., by Hamilton.

3See our §§ 44-46.

4See our §§ 307-311.

the corresponding State field. Such textual derivation emphasizes, too, the continuity, and the gradual and natural growth and development (with modification), uninterruptedly, from 1774 to the present day, of the Federal Organic law.

COMPARATIVE TABLE:—CONSTITUTION OF THE UNITED STATES AS ORIGINALLY EFFECTIVE, AND EARLIER TEXTS.

In the Table below, "A. of C." denotes the Articles of Confederation (effective March 1, 1781); abbreviations of State or Colony names denote State Constitutions prior to the Constitutional Convention of 1787, or Colony Charters; other abbreviations refer to Instruments presented in preceding pages of this Appendix.

EARLIER TEXTS.	CONST. U. S.
MASS.—We....the people of Massachusetts.....	We, the people of the United States,....
A. OF C.—....perpetual union	in order to form a more perfect union,
[Phrases common to American Constitutional Preambles, from 1638.]	establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity,
A. OF C.—....common defence, the security of their liberties, and their mutual and general welfare.	
MASS.—....do....ordain and establish the following....as the Constitution of the Commonwealth of Massachusetts.	do ordain and establish this Constitution for the United States of America.
MASS.—The department of legislation shall be formed by two branches, a senate and house of representatives.....	All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
A. OF C.—Congress of the United States	
MASS.—There shall be, in the Legislature of this Commonwealth, a representation of the people, annually elected.....	The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.
[Age requirement common in State texts.]	No person shall be a Representative who shall not have attained the age of twenty-five years,
[Common corresponding State-residence requirement, in State texts.]	and been seven years a citizen of the United States,
MASS.—....shall have been an inhabitant of....the town he shall be chosen to represent.....	and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.
[An adaptation of a common form of Colony and State Constitutional text, from 1638.]	Representatives and direct taxes shall be apportioned among the several States which may be included

EARLIER TEXTS.	CONST. U. S.
	within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.
MASS.—....Every .... town .... may elect one representative.....	
[Corresponding texts in State Constitutions].	
	When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.
ALB. CONV.—But, in case of vacancy by death or removal of any officer, civil or military, under this constitution, the Governor of the Province in which such vacancy happens may appoint, till the pleasure of the President-General and Grand Council can be known. [So, in other Colonial texts, and in State texts, and in A. of C., in varying forms.]	
MASS.—....shall choose their own Speaker, and appoint their own officers.....	The House of Representatives shall choose their Speaker and other officers,
[Common in the State Constitutions.]	and shall have the sole power of impeachment.
A. OF C.—....delegates shall be annually appointed in such manner as the Legislature of each State shall direct....no person shall be capable of being a delegate for more than three years in any term of six years; ....each State shall have one voto.	The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.
MASS.—[In State Senatorial Districts; each Senator one vote.]	
DEL.—The other branch shall be called "The Council," and consist of nine members; three to be chosen for each county at the time of the first election of the assembly, who shall be freeholders of the county	Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expira-

EARLIER TEXTS.	CONST. U. S.
for which they are chosen, and be upwards of twenty-five years of age. At the end of one year after the general election, the councillor who had the smallest number of votes in each county shall be displaced, and the vacancies thereby occasioned supplied by the freemen of each county choosing the same or another person at a new election in manner aforesaid. At the end of two years after the first general election, the councillor who stood second in number of votes in each county shall be displaced, and the vacancies thereby occasioned supplied by a new election in the manner aforesaid. And at the end of three years from the first general election, the councillor who had the greatest number of votes in each county shall be displaced, and the vacancies thereby occasioned supplied by a new election in manner aforesaid. And this rotation of a councillor being displaced at the end of three years in each county, and his office supplied by a new choice, shall be continued afterwards in due order annually forever, whereby, after the first general election, a councillor will remain in trust for three years from the time of his being elected, and a councillor will be displaced, and the same or another chosen in each county at every election.—[So, Pa., 1683: three classes; So. Car., 1776, two classes; Va., 1776, four classes.]	tion of the second year; of the second class, at the expiration of the fourth year, and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year;
[See above.]	and if vacancies happen by resignation or otherwise during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.
[See above, as to corresponding State requirements.]	No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States,
MASS.—....and at the time of his election he shall be an inhabitant in the [Senatorial] district for which he shall be chosen.	and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.
[As to the title "Vice-President," see below.]	The Vice-President of the United States
N. Y.— ....lieutenant-governor shall....be president of the senate, and upon an equal division have a casting vote.....	shall be President of the Senate, but shall have no vote, unless they be equally divided.

EARLIER TEXTS.	CONST. U. S.
MASS.—....appoint its own officers....N. Y....whenever the government shall be administered by the lieutenant-governor, or he shall be unable to attend as president of the senate, the senators shall have power to elect one of their own members to the office of president of the senate, which he shall exercise pro hac vice.	The Senate shall choose their other officers, and also a President pro tempore in the absence of the Vice-President, or when he shall exercise the office of President of the United States.
MASS.—The senate shall be a court, with full authority to hear and determine all impeachments....shall ....be sworn....	The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation.
N. Y.—....to consist [regularly] of....and judges of the Supreme Court.	When the President of the United States is tried, the Chief Justice shall preside;
N. Y.—....unless it be assented to by two-third parts of the members then present	and no person shall be convicted without the concurrence of two-thirds of the members present.
MASS.—Their judgment shall not extend further than to removal from office, and disqualification to hold or enjoy any place of honor, trust, or profit under this commonwealth; but the party so convicted shall be, nevertheless, liable to indictment, trial, judgment, and punishment, according to the laws of the land.	Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.
MASS.—The Legislature shall, by standing laws direct the time and manner of convening the electors....	The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.
A. OF C.—....to meet in Congress on the first Monday in November, in every year.....	The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.
MASS.—The Senate shall be the final judge of the elections, returns, and qualifications of its own members,....	Each house shall be the judge of the elections, returns, and qualifications of its own members,
MASS.—The House of Representatives shall be the judge of the returns, elections and qualifications of its own members. [So, other States, e. g., N. H., N. J.]	
N. Y.—[Senate]....a majority of the number of senators....shall be	and a majority of each shall constitute a quorum to do business;

EARLIER TEXTS.	CONST. U. S.
necessary to constitute a senate sufficient to proceed upon business;	
N. Y.—[House] . . . . and that a majority of the said members shall, from time to time, constitute a house to proceed upon business.	
MASS.—The senate shall have power to adjourn themselves; provided such adjournments do not exceed two days at a time. [Id., as to the House: see below.]	but a smaller number may adjourn from day to day,
[Colonial and State texts.]	and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.
MASS.—[Senate] . . . . determine its own rules of proceedings . . . .—[House] . . . . settle the rules and order of proceeding . . . .—[A common form of provision].	Each house may determine the rules of its proceedings,
[Expressed or implied in Colonial and State texts].	punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member.
A. OF C.—[The Congress] . . . . shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations as in their judgment require secrecy; and the yeas and nays of the delegates of each State, on any question, shall be entered on the journal when it is desired by any delegate;	Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.
N. Y.—That neither the assembly or the senate shall have the power to adjourn themselves for any longer time than two days without the mutual consent of both.	Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days,
[Place of sitting generally closely prescribed.]	nor to any other place than that in which the two houses shall be sitting.
[State Constitutions].	The Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the Treasury of the United States.
A. OF C.—Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonment during the time of	They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either

EARLIER TEXTS.	CONST. U. S.
their going to and from, and attendance on, Congress, except for treason, felony, or breach of the peace.	house they shall not be questioned in any other place.
A. OF C.—....nor shall any person, being a delegate, be capable of holding any office under the United States for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.	No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.
MASS.—All money bills shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.	All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.
MASS.—No bill or resolve of the senate or the house of representatives shall become a law, and have force as such, until it shall have been laid before the governor for his revisal, and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the senate or house of representatives, in whichsoever the same shall have originated, who shall enter the objections sent down by the governor, at large, on their records, and proceed to reconsider the said bill or resolve; but if, after such reconsideration, two-thirds of the said senate or house or representatives shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two-thirds of the members present, shall have the force of law; but in all such cases, the vote of both houses shall be determined by yeas and nays; and the names of the persons voting for or against the said bill or resolve shall be entered upon the public records of the commonwealth. And in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days after it shall have	Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall

EARLIER TEXTS.	CONST. U. S.
been presented, the same shall have the force of law.	take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.
ALB. CONV.—....the President-General and Grand-Council....have power to make laws, and lay and levy such general duties, imposts, or taxes....[Colonial texts].	The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States;
[Numerous Colonial and State texts, with use of the term "equal" in the same sense as that of the term "uniform."]*	but all duties, imposts and excises shall be uniform* throughout the United States.
A. OF C.—....to borrow money or emit bills on the credit of the United States.....	To borrow money on the credit of the United States;
[A power early and long in exercise: see our § 18].	To regulate commerce with foreign nations
A. OF C.—....the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively;....	and among the several States
A. OF C.—....regulating the trade and managing all affairs with the Indians, not members of any of the States;	and with the Indian tribes;
N. Y.—In the discretion of the legislature to naturalize all such persons, and in such manner, as they shall think proper: Provided [oath of allegiance, from aliens].	To establish an uniform rule of naturalization,
[Nationalization (in the discretion of Congress) of the then existing field of State Insolvency power: there being then no Federal inhibition upon State Insolvency discharge].	and uniform laws on the subject of bankruptcies throughout the United States;
A. OF C.—....the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States:	To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

*As to "uniform" and "equal" as mere variants, see our § 359.

EARLIER TEXTS.	CONST. U. S.
	To provide for the punishment of counterfeiting the securities and current coin of the United States;*
A. OF C.—....establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office;	To establish post-offices and post-roads;
	To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
[See below].	To constitute tribunals inferior to the Supreme Court;
A. OF C.—....appointing courts for the trial of piracies and felonies committed on high seas;	To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;
A. OF C.—....the sole and exclusive right and power of determining on peace and war, except....	To declare war,
A. OF C.—....granting letters of marque and reprisal....	grant letters of marque and reprisal,
A. OF C.—....establishing rules for deciding, in all cases, what captures on land and water shall be legal.....	and make rules concerning captures on land and water;
A. OF C.—....to agree upon the number of land forces, and to make requisitions from each State for its quota.....	To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
A. OF C.—....to build and equip a navy;....	To provide and maintain a navy;
A. OF C.—....making rules for the government and regulation of the said land and naval forces,....	To make rules for the government and regulation of the land and naval forces;
A. OF C.—....to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State,	To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;
[See below].	To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States,

*As to mere accidental recent historical ground for this text, and as to its character as surplusage, see our § 94.

EARLIER TEXTS.	CONST. U. S.
When land forces are raised by any State for the common defense, all officers of or under the rank of Colonel shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.	reserving to the States respectively the appointment of the officers,
	and the authority of training the militia according to the discipline prescribed by Congress;
[As to the clause generally, as adding little or nothing, in legal effect, see our §§ 69-78; 143-149].	To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and
CONN. 1638-9....which deputies shall [severally] have the power of the whole town to give their votes and allowance to all such laws and orders as may be for the public good, and unto which the said towns are to be bound.	To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.
NEW ENG. CONF.....and all things of like nature which are the proper concomitants or consequences of such a confederation, for amity, offence and defence;....	
ORD. 1784....That after the year 1800 of the Christian era, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes, whereof the party shall have been duly convicted to have been personally guilty.—Ord. 1787 — There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted.....	The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.
[Common in State Bills of Rights].	The privilege of the writ of habeas corpus shall not be suspended, unless

EARLIER TEXTS.	CONST. U. S.
	when in cases of rebellion or invasion the public safety may require it. No bill of attainder or ex post facto law shall be passed.
[See near the beginning of this Table].	No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.
	No tax or duty shall be laid on articles exported from any State.
[See Colonial texts].	No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.
ALB. CONV.—Yet no money to issue but by joint orders of the President-General and Grand Council; except where sums have been appropriated to particular purposes, and the President-General is previously empowered by an act to draw such sums. MASS.—No money shall be issued out of the treasury of this commonwealth, (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon), but by warrant under the hand of the governor for the time being,....agreeably to the acts and resolves of the general court.—[So, State texts, generally].	No money shall be drawn from the Treasury but in consequence of appropriations made by law;
A. OF C.—[Committee of the States]....transmitting every half year to the respective States an account of the sums of money so borrowed or emitted;....	and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.
A. OF C.—....nor shall the United States, in Congress assembled, grant any title of nobility.	No title of nobility shall be granted by the United States;
A. OF C.—....nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state;	and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.
A. OF C.—No State, without the consent of the United States, in Congress assembled, shall send any em-	No State shall enter into any treaty, alliance, or confederation;

EARLIER TEXTS.	CONST. U. S.
bassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince, or state; No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.	
	grant letters of marque and reprisal;
	coin money; emit bills of credit;
	make anything but gold and silver coin a tender in payment of debts;*
[State Bills of Rights].	pass any bill of attainder, ex post facto law,
ORD. 1787. . . . And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed.	or law impairing the obligation of contracts,
[See above.]	or grant any title of nobility.
[See Privileges and Immunities clauses and Commerce clauses of Colonial texts].	No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty of tonnage;
No vessel of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States, in Congress assembled, for the defense of such State or its trade, nor shall any body of forces be kept up by	keep troops or ships of war in time of peace,

*Covered, in legal effect, by the Impairment clause, below: see our §§ 444-457; 458-466.

EARLIER TEXTS.	CONST. U. S.
any State in time of peace, except such number only as, in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State;	
[A. OF C.—text, close above].	enter into any agreement or compact with another State or with a foreign power
engage in any war unless such State be actually invaded and the danger is so imminent as not to admit of delay.	or engage in war unless actually invaded or in such imminent danger as will not admit of delay.
N. H.....there shall be a supreme executive magistrate who shall be styled The President of the State of New Hampshire.	The executive power shall be vested in a President of the United States of America.
[N. J.; Pa.; So. Car.; President and Vice-President].	
[Different lengths of term in different States].	He shall hold his office during the term of four years,
[As to Vice-President. See immediately above].	and, together with the Vice-President,
[State Constitutions, generally].	chosen for the same term,
DEL.—That the Senate be chosen in the following manner: All persons qualified as aforesaid to vote for county Delegates, shall, on the first day of September, 1781, and on the same day in every fifth year forever thereafter, elect, viva voce, by a majority of votes, two persons for their respective counties (qualified as aforesaid to be elected county Delegates) to be electors of the Senate;	be elected as follows:
	Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.
DEL.—That the said electors of the Senate meet on the third Monday in September, 1781, and on the same day in every fifth year forever thereafter, and they, or any twenty-four of them so met, shall proceed to elect, by ballot, either out of their own body, or the people at large, fifteen Senators (nine of whom to be residents on the western, and six to be residents on the eastern, shore).	*The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be
That the Senators shall be balloted for, at one and the same time, and out of the gentlemen residents of the western shore, who shall be proposed as Senators, the nine who	

*The paragraph here beginning, ending "by ballot the Vice-President" Amended by the Twelfth Amendment (for the text of which see our § 25).

EARLIER TEXTS.	CONST. U. S.
shall, on striking the ballots, appear to have the greatest numbers in their favor, shall be accordingly declared and returned duly elected: and out of the gentlemen residents of the eastern shore, who shall be proposed as Senators, the six who shall, on striking the ballots, appear to have the greatest number in their favor, shall be accordingly declared and returned duly elected: and if two or more on the same shore shall have an equal number of ballots in their favor, by which the choice shall not be determined on the first ballot, then the electors shall again ballot, before they separate; in which they shall be confined to the persons who on the first ballot shall have an equal number: and they who shall have the greatest number in their favor on the second ballot, shall be accordingly declared and returned duly elected:	counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed;
PA.—The President and Vice-President shall be chosen annually by the joint ballot of the general assembly and council.—[See early Colonial texts].	and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.
[See Del., above].	The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.
[As to State requirements of age and of State-residence, see above].	No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to

EARLIER TEXTS.	CONST. U. S.
	the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.
[State texts].	In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President,
	and the congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.
MASS.—As the public good requires that the governor should not be under the undue influence of any of the members of the general court, by a dependence on them for his support; that he should, in all cases, act with freedom for the benefit of the public; that he should not have his attention necessarily diverted from that object to his private concerns; and that he should maintain the dignity of the commonwealth in the character of its chief magistrate, it is necessary that he should have an honorable stated salary, of a fixed and permanent value, amply sufficient for those purposes, and established by standing laws; and it shall be among the first acts of the general court, after the commencement of this constitution, to establish such salary by law accordingly.	The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.
[State Constitutions, generally].	Before he enter on the execution of his office he shall take the following oath or affirmation:
	"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States."
MASS.—The governor of this commonwealth, for the time being, shall be the commander-in-chief of the army and navy, and all the military	The President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into

EARLIER TEXTS.	CONST. U. S.
forces of the State by sea and land; ....[State texts, generally].	the actual service of the United States;
	he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices,
[State Constitutions, generally].	and he shall have power to grant reprieves and pardons for offenses against the United States,
MASS.—....except such as persons may be convicted of by impeachment.	except in cases of impeachment.
SC. CAR.—That the governor and commander-in-chief shall have no power to....enter into any final treaty without the consent of the senate and house of representatives.	He shall have power, by and with the advice and consent of the Senate, to make treaties,
[Two-thirds vote a familiar requirement of Colonial and State texts].	provided two-thirds of the Senators present concur;
MASS.—All judicial officers, the attorney-general, the solicitor-general, all sheriffs, coroners and registers of probate shall be nominated and appointed by the governor, by and with the advice and consent of [the council].	and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law;
[Familiar State practice].	but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.
[Alb. Conv., cited above].	The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.
N. Y.—That it shall be the duty of the governor to inform the legislature, at every session, of the condition of the State....; to recommend such matters to their consideration as shall appear to him to concern its good government, welfare and prosperity;....	He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient;
N. Y.—....to convene the assembly and senate on extraordinary occasions;....	he may, on extraordinary occasions, convene both houses, or either of them,
N. Y.—....to prorogue them from time to time.....	and in case of disagreement between them with respect to the time of ad-

EARLIER TEXTS.	CONST. U. S.
	journment, he may adjourn them to such time as he shall think proper;
N. Y.—....to correspond with the Continental Congress, and other States;....	he shall receive ambassadors and other public ministers;
N. Y.—....to take care that the laws are faithfully executed....	he shall take care that the laws be faithfully executed,
[Common in State Constitutions].	and shall commission all the officers of the United States.
[Common in State Constitutions, mutatis mutandis].	The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.
A. OF C.—....and establishing courts for receiving and determining finally appeals in all cases of captures; [Court for suits between States].	The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.
MASS.—All judicial officers.... shall hold their offices during good behavior, excepting [removal by Governor and Executive Council upon address of both Houses].	The judges, both of the supreme and inferior courts, shall hold their offices during good behavior,
MASS.—Permanent and honorable salaries shall also be established by law for the justices of the supreme judicial court.	and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.
	The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls;
[See above, Admiralty Courts; see, as to early other Admiralty Jurisdiction, our §§ 12-18].	to all cases of admiralty and maritime jurisdiction;
	to controversies to which the United States shall be a party;
A. OF C.—The United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever;....and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine	to controversies between two or more States;

EARLIER TEXTS.	CONST. U. S.
the controversy. [As to the origin of the Jurisdiction, (prior to the Articles of Confederation), see our § 18].	
	between a State and citizens of another State; between citizens of different States;
A. OF C.—Controversies concerning the private right of soil claimed under different grants of two or more States,....shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States. —See, above, in this Appendix, Wyoming Controversy, and New Hampshire Grants.	between citizens of the same State claiming lands under grants of different States,
[See above].	and between a State, or the citizens thereof, and foreign States, citizens, or subjects.
	In all cases affecting ambassadors, other public ministers and consuls,
[See above].	and those in which a State shall be party.
[See above: suits between States].	the Supreme Court shall have original jurisdiction.
[See above, as to Federal Admiralty Appeals].	In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.
[Common to State Bills of Rights].	The trial of all crimes, except in cases of impeachment, shall be by jury;
MASS.—In criminal prosecutions the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen. —[Common to State Bills of Rights; Magna Charta].	and such trial shall be held in the State where the said crimes shall have been committed;
	but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.
	Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

EARLIER TEXTS.	CONST. U. S.
[The Common Law rule].	No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
	The Congress shall have power to declare the punishment of treason,
N. Y.—....shall not work corruption of blood.....	but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.
A. OF C.—Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.	Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.
	And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.
A. OF C.—....the free inhabitants of each of these States,....shall.... be entitled to all privileges and immunities of free citizens in the several States;	The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.
A. OF C.—If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State shall flee from justice and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.....	A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.
NEW ENG. CONF.—It is also agreed that if any servant run away from his master into another of these confederated jurisdictions, that in such case, upon the certificate of one magistrate in the jurisdiction out of which the said servant fled, or upon other due proof, the said servant shall be delivered either to his master or any other that pursues and brings such certificate or proof.—— A. OF C.—....provided that such restriction shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant;....	No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.
A. OF C.—Canada, acceding to this Confederation, and joining in the measures of the United States, shall	New States may be admitted by the Congress into this Union; but no new State shall be formed or

EARLIER TEXTS.	CONST. U. S.
be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.	erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.
NEW ENG. CONF.—....Provided: that no other jurisdiction shall hereafter be taken in as a distinct head or member of this confederation.... without [consent of three-fourths of the Commissioners].	
[A power already long in exercise, as in Ords. 1784, 1787. See our §§ 12-18].	The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;
	and nothing in this Constitution shall be so construed as to prejudice any claims of the United States
A. OF C.—....no State shall be deprived of territory for the benefit of the United States.	or of any particular State.
ORD. 1784.—That their respective [Territorial and ultimate State] governments shall be in republican forms.....	The United States shall guarantee to every State in this Union a republican form of government,
[Pre-1787 texts, generally].	and shall protect each of them against invasion,
[Colonial texts].	and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.
A. OF C.—....nor shall any alteration at any time hereafter be made in [the Articles of Confederation] unless such alteration be agreed to in a Congress of the United States,	The Congress whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution,
	or, on the application of the legislatures of two thirds of the several States, shall call a Convention for proposing amendments, which in either case shall be valid, to all intents and purposes, as part of this Constitution,
A. OF C.—....and be afterwards confirmed by the Legislatures of every State.	when ratified by the legislatures of three fourths of the several States
MASS.—[Action by Legislature, and two-thirds popular vote or Convention].	or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress;
[A. OF C.—Slavery section. See also, Slavery provision, Ord. 1787].	provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first

EARLIER TEXTS.	CONST. U. S.
	and fourth clauses in the ninth section of the first article;
[So, A. of C., in various texts].	and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.
A. OF C.—All bills of credit emitted, moneys borrowed and debts contracted by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, ...	All debts contracted and engagments entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the confederation.
A. OF C.—Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State.....[So, early Colonial texts].	This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.
[Common in State Constitutions].	The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution;
MD.—That no other test or qualification ought to be required on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office....and a declaration of a belief in the Christian religion	but no religious test shall ever be required as a qualification to any office or public trust under the United States.
	The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.*
[Colonial and State texts].	Done in convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth.
[Signing: an American common practice].	In witness whereof, we have hereunto subscribed our names.

*The violation, by this text, of the Articles of Confederation, ultimately cured by action in all the States.

INDEX.